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No. 02-

IN THE

Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

28 U.S.C. § 1782 authorizes the federal district courts to grant discovery to "interested person[s]" for use "in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." The questions presented are:

1. Whether section 1782 authorizes a federal district court to provide a private person with discovery that the foreign jurisdiction itself does not authorize.

2. Whether section 1782 allows civil discovery by a private person when no "proceeding" before a foreign "tribunal" is pending or even imminent.

3. Whether section 1782 extends discovery rights in the United States to private non-litigants.

PARTIES TO THE PROCEEDING

The only parties to this proceeding are identified in the caption.

RULE 29.6 STATEMENT

Petitioner Intel Corporation is a publicly traded corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Intel Corporation ("Intel") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 292 F.3d 664. The opinion of the district court (Pet. App. 13a-15a) is unreported.

JURISDICTION

The court of appeals entered its decision on June 6, 2002. A timely petition for rehearing or rehearing en banc was denied on September 3, 2002 (Pet. App. 11a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1782 is printed in the appendix to this petition (Pet. App. 17a).

INTRODUCTION AND SUMMARY

The questions presented in this case, concerning the proper interpretation of 28 U.S.C. § 1782, are the subjects of two distinct circuit conflicts, each of which independently warrants this Court's review. Section 1782 authorizes a federal district court to grant discovery to an "interested person" "in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." In the decision below, the Ninth Circuit held that section 1782 entitles respondent Advanced Micro Devices, Inc. ("AMD") to civil discovery in the United States concerning its closest competitor, petitioner Intel Corporation, even though AMD is not a litigant in any current "proceeding" before a foreign "tribunal." The court ruled that AMD had triggered full section 1782 discovery rights simply by complaining about Intel to a foreign law enforcement authority (the European Commission's Competition Directorate General), even though that authority is conducting only what the court of appeals aptly called a "preliminary investigation" (Pet. App. 3a-4a) and European law itself does not authorize AMD to obtain the discovery at issue.

In so ruling, the Ninth Circuit placed itself in acknowledged conflict with other courts of appeals on two different issues of statutory interpretation. First, in granting AMD discovery that the EC itself does not authorize, the Ninth Circuit has joined and deepened an existing circuit conflict concerning whether section 1782 discovery, which Congress intended "to assist foreign and international tribunals" and actual "litigants before such tribunals," *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 2 (1st Cir. 1992), is properly limited to circumstances in which the foreign authority itself would allow discovery. Second, in permitting such discovery even though the EC is currently conducting only a "pre-

liminary investigation," the decision below expressly conflicts with decisions of other courts of appeals that preclude section 1782 discovery where no foreign adjudicative proceeding is underway or at least "imminent." These acknowledged circuit conflicts are ripe for this Court's review, and, until resolved, they will present a continuing affront to principles of international comity. Foreign nations, courts, and litigants must obtain—and perceive that they have obtained—consistent treatment in U.S. courts. Failure to resolve the conflicts presented here would encourage forum shopping and inconsistent results and would compromise international confidence in the American judicial system.

Finally, on the merits, the Ninth Circuit's expansive view of section 1782 is untenable as a matter of law and national litigation policy. The court's holding invites an onslaught of pre-litigation discovery requests from persons involved in countless foreign administrative matters involving U.S. individual or corporate interests, including literally thousands of competition law matters reviewed each year by foreign antitrust agencies. This Court's intervention is needed both to protect U.S. interests and courts from these unfair discovery burdens and to restore national consistency to this deeply unsettled area of law.

STATEMENT

1. The foreign law enforcement inquiry on which respondent AMD has predicated its request for section 1782 discovery is a "preliminary investigation" (Pet. App. 3a-4a) by the European Commission ("EC" or "Commission"). AMD triggered this investigation by complaining to the Directorate General for Competition, an arm of the EC, that Intel had engaged in anticompetitive practices in violation of Articles 81 and 82 of the European Community Treaty.

Upon the receipt of any complaint charging anticompetitive practices, the EC conducts a preliminary inquiry, of the type now pending, before deciding whether to take more

formal prosecutorial steps. 3 E.R. 498.[1] At the conclusion of this preliminary investigation, the EC may proceed on the complaint only if it concludes *both* that a violation of Article 81 or 82 may have occurred *and* that such violation is "significant enough" to warrant the EC's attention. 1 E.R. 10. A decision by the EC not to proceed is subject to limited review by the Court of First Instance. Pet. App. 4a. If, on the other hand, the EC has reason to believe both that a violation may have occurred and that such violation is worthy of its prosecutorial resources, it launches a second stage of its inquiry by issuing a so-called Statement of Objections. 3 E.R. 500. In this more formal stage, the party under investigation has the right to request a non-public hearing to present its views to the EC. 3 E.R. 501. As discussed below, however, even in this second stage, the EC continues to act not as an "adjudicator," but as a law enforcement agency. *See* pp. 15-16, *infra*.

In performing its law enforcement functions, the EC wields extensive investigative powers. Among other things, the EC is empowered to conduct "dawn raids"—on-site inspections at companies' premises conducted without prior notice. 3 E.R. 499. It is also empowered, under Article 11 of European Economic Community Council Regulation 17, to issue requests for documents and for answers to written questions (these are known as "Article 11 requests") and to compel responses to such requests through various sanctions. *Id.* In part because the EC possesses such extensive authority to obtain directly for itself any information it deems relevant, it relies on its investigative powers to obtain documents from companies under investigation and does not depend upon private complainants to conduct that function on its behalf. 3 E.R. 502.

Moreover, as a law enforcement agency, the EC does not separate its investigative and decisionmaking functions. The

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[1] "E.R." cites indicate the relevant volume and page numbers of the Ninth Circuit "Excerpts of Record."

EC does not employ judges or any other independent decisionmakers to resolve disputes between its investigating case officers and companies under investigation. 3 E.R. 503. Instead, the same investigative case officers who are empowered to conduct dawn raids and demand the production of documents through Article 11 requests are responsible for preparing the EC's final decisions at the conclusion of its inquiries or formal investigations. 3 E.R. 498, 502; EC Regulation 17, Art. 10(5) (3 E.R. 529); *see also* note 4, *infra*.

Complainants to the EC have limited rights. Under applicable European law, complainants are "limited to a role which corresponds to the position, under criminal procedure, of a person who reports a matter to the authorities." *AKZO Chemie BV* v. *E.C. Comm'n*, [1987] 1 C.M.L.R. 231, 248 (3 E.R. 570). Accordingly, complainants have no discovery rights and "may not in any circumstances be given access to documents containing business secrets" of a competitor. *Id.* at 259 (3 E.R. 575). Indeed, complainants have no right to view any documents submitted to the EC itself during a preliminary investigation of the type now pending. 3 E.R. 500-01.

2. On October 23, 2000, AMD complained to the EC about Intel's alleged violations of the European Union's competition laws. 3 E.R. 505. Three months later, on January 18, 2001, the EC sent Intel an Article 11 request for information. *Id.* The request asked Intel to produce documents and answer questions related to AMD's general allegations. *Id.* Intel replied to the request on February 28, 2001. *Id.* Three months later, the EC provided Intel with a redacted copy of AMD's complaint. 3 E.R. 506. In August 2001, Intel submitted to the EC (but not to AMD) a response to that complaint. *Id.* The EC has not asked Intel to answer any further Article 11 requests, and the investigation remains in this preliminary phase. *Id.* Neither Intel nor AMD has been provided with copies of any other submissions made by the other to the EC. There is no process for complainants and

companies under investigation to serve each other with their submissions to the EC. 3 E.R. 503.

During this preliminary inquiry, AMD urged the EC to direct Intel to turn over, for the EC's own use, documents that Intel had produced in unrelated litigation in the United States with a company called Intergraph Corporation.[2] The EC, however, declined to seek those documents. *See* Supp. E.R. 6-7.

3. On October 1, 2001, AMD applied to the district court for discovery under 28 U.S.C. § 1782. 1 E.R. 1. AMD asked the court to compel Intel, ostensibly for the EC's use in the ongoing preliminary investigation, to produce the very documents from the Intergraph proceeding that the EC itself had declined to pursue. *Id.* The total volume of documents sought by AMD is estimated at approximately 600,000 pages. 1 E.R. 93-95. Intel argued in response that section 1782 does not authorize such discovery because, among other considerations, AMD is not a litigant in a "proceeding" before a "tribunal" and, in any event, AMD has no right to documents that are not discoverable under the law of the foreign jurisdiction for whose benefit they are supposedly sought.

The district court denied AMD's application. 3 E.R. 755. The court emphasized that AMD's complaint to the EC "is in the initial stage of preliminary inquiry" and that the EC, "in the conduct of an investigation, performs the functions of investigator, prosecutor and decision-maker without any separation." *Id.* The court thus concluded that the EC does not conduct adjudicative "proceedings" and is not a "tribunal" for purposes of section 1782. *Id.*

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[2] In that lawsuit, Intergraph had accused Intel of patent infringement as well as various other state and federal law violations, including antitrust violations. Intel prevailed on the merits of the antitrust claims in that suit. *Intergraph Corp.* v. *Intel Corp.*, 88 F. Supp. 2d 1288 (N.D. Ala. 2000), *aff'd*, 253 F.3d 695 (Fed. Cir. 2001).

4. The court of appeals reversed. It held that, to qualify for discovery under section 1782, AMD need not be a litigant in an ongoing or even imminent foreign adjudicative proceeding. It is enough, the court reasoned, that the current preliminary investigation may eventually "lead[] to quasi-judicial proceedings," in that an ultimate EC decision not to prosecute will be subject to judicial review and a decision to prosecute would trigger a more formal second-stage inquiry. Pet. App. 6a. In the court's view, the second-stage inquiry is "quasi-judicial" enough that its prospect triggers discovery rights in the United States under section 1782, even though the EC maintains no separation between its prosecutorial and decisionmaking functions, Pet. App. 14a, and even though the EC does not conduct "adversary proceedings between the complainant and the undertaking concerned." *AKZO Chemie*, [1987] 1 C.M.L.R. at 248 (3 E.R. 570). Finally, rejecting the need for any "threshold showing . . . that what is sought be discoverable in the foreign proceeding," the court found it inconsequential that EC procedures categorically deny AMD the very discovery that it seeks, supposedly for the benefit of the EC, through United States law. Pet. App. 7a-8a.[3]

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[3] The Ninth Circuit subsequently denied Intel's motion to stay the proceedings pending disposition of this petition for certiorari. It remanded the case back to the district court, where, unless the judgment below is reversed, the court will ultimately need to resolve questions about, among other things, the discoverability of particular categories of documents under general discovery principles. Meanwhile, the EC's preliminary investigation in response to AMD's complaint is almost certain to remain open "until the second half of 2003 at the earliest." Intel C.A. Mot. for Stay 18 (citing Decl. of Alastair Sutton ¶ 11).

REASONS FOR GRANTING THE PETITION

Treating section 1782 as a font of "liberal discovery" (Pet. App. 8a), the Ninth Circuit held that a private company may come to a United States court to obtain, for the ostensible benefit of a foreign law enforcement authority, massive discovery that the foreign authority itself does not authorize the company to receive and has specifically declined to request for its own use. Moreover, the Ninth Circuit held that such discovery is available where, as here, no "proceeding" before a foreign "tribunal" is underway or even imminent, even though the plain language of section 1782 conditions any discovery on the existence of such a proceeding. In the process, the Ninth Circuit placed itself on the wrong side of two distinct and fully mature circuit conflicts. If this case had arisen in several other circuits, where a less expansive view of section 1782 prevails, the result would have been the opposite of the one reached here. This Court's intervention is thus needed to restore national consistency to the manner in which U.S. courts respond to requests for discovery for use in foreign jurisdictions.

I. The Ninth Circuit's Decision Conflicts With Decisions Of Other Circuits Rejecting Discovery Under Section 1782 Where The Foreign Authority Does Not Itself Provide For Discovery

It is undisputed that European Community law denies discovery rights to mere complainants such as AMD. 3 E.R. 503. The Ninth Circuit nonetheless construed section 1782 to permit the very discovery that EC law forecloses, reasoning that section 1782 requires no "threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." Pet. App. 8a. The court reached that conclusion even though the undisputed purpose of section 1782 is to facilitate international comity by "assist[ing] foreign and international tribunals." *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 2 (1st Cir. 1992); *see also* S. Rep. No. 88-1580, *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788

(section 1782 is designed to "adjust[]" U.S. discovery procedure "to the requirements of foreign practice and procedure").

This anomalous holding unhinges section 1782 from that intended purpose and, as the court of appeals acknowledged (Pet. App. 7a-8a), conflicts with established precedent in several other circuits. The First Circuit has held that "a litigant requesting assistance under Section 1782 has to show that the information sought in the United States would be discoverable under foreign law." *Asta Medica*, 981 F.2d at 7. The court explained, among other things, that "United States discovery rules are far more liberal than their foreign counterparts"; that construing section 1782 to permit litigants to side-step foreign discovery limitations would "place United States litigants in a more detrimental position than their opponents when litigating abroad"; that "[t]his result would be contrary to the concept of fair play embodied in United States discovery rules" and in section 1782 itself; and that, even "more importantly, foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws." *Id.* at 5-7.

Likewise, the Eleventh Circuit has determined that "the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance." *In re Request for Assistance From Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) (citations omitted); *accord In re Lo Ka Chun*, 858 F.2d 1564, 1566 (11th Cir. 1988). And the Fifth Circuit has similarly indicated that it too will follow that approach when confronted with a discovery request by a private person (as distinguished from a foreign government). *See In re Letter Rogatory From First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d 308, 310 (5th Cir. 1995) ("[t]he case law in this area is very clear" in mandating "a discoverability determination when the request for information comes from a private litigant"); *see also In re Letter of Request From Crown Prosecution Service of United Kingdom*, 870

F.2d 686, 692 n.7 (D.C. Cir. 1989) (quoting *Trinidad & Tobago*, 848 F.2d at 1156).

In contrast, the Second and Third Circuits, splitting with the First, Fifth, and Eleventh, have joined the Ninth in generally permitting liberal discovery under section 1782 even when the law of the foreign jurisdiction does not authorize it. For example, the Second Circuit "ha[s] held that there is no requirement of discoverability implied in the statute; that is, the district court need not satisfy itself that the discovery sought in the petition is of information that would be discoverable under the laws of the foreign jurisdiction in which the proceeding is pending." *See Euromepa, S.A. v. R. Esmerian, Inc.*, 154 F.3d 24, 28 (2d Cir. 1998) (citing *In re Application of Gianoli*, 3 F.3d 54, 59-61 (2d Cir. 1993)). As that court observed, "[t]his holding is in contrast to the First and Eleventh Circuits and to a certain degree the D.C. Circuit." *Id.* (citing *Asta Medica*, *Trinidad & Tobago*, and *Crown Prosecution*, 870 F.2d at 687, 692-93 & 692 n.7). Similarly, the Third Circuit has expressly refused to "impos[e] a requirement that the materials sought be discoverable in the foreign jurisdiction." *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998). This six-court, three-to-three circuit conflict is plainly ripe for this Court's resolution, and this case provides the appropriate vehicle for resolving it.

On the merits, the First, Fifth, and Eleventh Circuits are correct in limiting section 1782 discovery to cases in which such discovery would serve its underlying statutory objective: effectuating, rather than grossly enlarging, the discovery rights authorized by the foreign jurisdiction on whose behalf the discovery is supposedly sought. This case presents a case study in why that limitation is critical to the comity objectives of section 1782. European Community law places particular emphasis on precluding mere complainants from obtaining the proprietary documents of their rivals, since "[a]ny other solution would lead to the unacceptable consequence that [a company] might be inspired to lodge a complaint with the Commission solely in order to gain access

to its competitors' business secrets." *AKZO Chemie*, [1987] 1 C.M.L.R. at 259 (3 E.R. 575). The decision below thus not only diverts section 1782 from its intended purpose—accommodating the discovery needs of foreign jurisdictions—but charts "a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation." *Asta Medica*, 981 F.2d at 6.

In the court of appeals, AMD mischaracterized the subject of this circuit conflict as a question of "reciprocity," but that is a misnomer—and a telling one. The issue here is not whether EC law permits private-party discovery in aid of analogous "proceedings" in the United States, but whether EC law permits private-party discovery for use in the very EC investigation that this discovery is ostensibly designed to support. That fact underscores the tenuousness of the Ninth Circuit's ruling on the merits. It is undisputed not just that EC law denies such discovery to private complainants, but also that the EC found that the specific discovery materials at issue in this case are so inconsequential *to its own investigation* that it rejected AMD's suggestion that the EC itself require Intel to produce them. *See* Supp. E.R. 6-7. And, of course, AMD has no independent discovery rights against Intel under domestic U.S. law, because it has not filed a lawsuit in this country and has therefore not taken on the rights and responsibilities that would follow from becoming an actual *litigant*.

The upshot of the decision below is thus that, throughout the Ninth Circuit, section 1782 now imposes civil discovery obligations in circumstances where neither foreign law nor domestic U.S. law would permit such discovery to proceed. Congress did not intend that bizarre result, and this Court's intervention is needed to conform the application of section 1782 to its legislative purpose: accommodating the actual discovery needs of foreign *tribunals* and the actual *litigants* that appear before them.

II. The Panel's Decision Conflicts With Other Circuits' Holdings That Litigation Must Be Pending Or At Least "Imminent" Before Discovery Under Section 1782 Is Appropriate

The decision below deepens a separate circuit conflict on an independent issue as well: whether, as the Second Circuit has held, an adjudicative or quasi-adjudicative "proceeding" before a foreign "tribunal" must be pending or at least imminent before section 1782 permits discovery in the United States.

When a party files an antitrust complaint with the EC, the EC conducts a "preliminary investigation," which is not "considered an adversarial proceeding." Pet. App. 3a-4a. Only at the conclusion of this "pre-investigation" (1 E.R. 10) does the EC decide whether the complaint has sufficient merit and significance to warrant more formal prosecutorial action. Pet. App. 4a; *see also* pp. 4-5, *supra*. For purposes of its analysis, the court of appeals accepted that the EC is currently engaged in this first-stage "preliminary investigation"; that this preliminary investigation is not itself an "adjudicative" or "quasi-adjudicative" proceeding; that it therefore does not itself qualify as a "proceeding" before a "tribunal" under section 1782; and that no such proceeding is pending now or even "imminent." Pet. App. 2a, 6a; *see also* note 4, *infra*.

In nonetheless granting relief to AMD, the court of appeals held that discovery is appropriate so long as the pending *non*-adjudicative investigation, while not itself a "proceeding" before a "tribunal" for purposes of section 1782, is "one *leading to* quasi-judicial proceedings," even if such proceedings are not imminent. Pet. App. 6a (emphasis added). That holding is flawed, and warrants this Court's review, on two independent levels.

a. First, by rejecting any requirement that the "proceeding" for which discovery is sought "be imminent" (Pet. App. 6a), the decision below deepens the Ninth Circuit's conflict

with ten years of Second Circuit precedent. *See id.* (following *United States* v. *Sealed 1, Letter of Request for Legal Assistance From Deputy Prosecutor Gen. of Russian Fed.*, 235 F.3d 1200, 1205 (9th Cir. 2000) (discussing conflict)).

Under the most natural reading, section 1782 authorizes civil discovery only if, among other things, a "proceeding" is already underway before a foreign "tribunal." If Congress had intended to permit civil discovery *before* the commencement of such a proceeding, it would not have limited the category of investigations eligible for pre-litigation discovery to "criminal investigations conducted before formal accusation." 28 U.S.C. § 1782(a). Similarly, with language closely tracking that of section 1782(a), Congress has made separate provision for civil discovery in the United States "to assist a foreign antitrust authority . . . in determining whether a person has violated . . . foreign antitrust laws," even before the commencement of an adjudicative proceeding—but only "[o]n the application of the Attorney General . . . in accordance with an antitrust mutual assistance agreement." 15 U.S.C. § 6203(a). If Congress had wished to extend similar pre-litigation rights to *private* entities, it would have done so. Consistent with this analysis, the Eleventh Circuit has indicated that, unlike a foreign governmental institution, "a private individual may need to be a *litigant* in a *pending* proceeding in order to be an 'interested person'" entitled to discovery under section 1782. *Trinidad & Tobago*, 848 F.2d at 1155-56 (emphasis added); *see also Asta Medica*, 981 F.2d at 2 (section 1782 is designed "to assist foreign and international tribunals" and "litigants before such tribunals").

Nonetheless, erring on the side of greater discovery rights, the Second Circuit has expanded upon the plain language of section 1782 to grant private entities discovery in anticipation of quasi-adjudicative foreign proceedings that, while not pending, are at least "imminent." As that court has elaborated, however, "a proceeding must be 'imminent—*very likely to occur and very soon to occur*'—in order to satisfy the statutory requirements" of section 1782. *Euromepa*, 154

F.3d at 29 (citation omitted, emphasis added). The Second Circuit has repeatedly reaffirmed this "imminence" requirement as an essential limitation on the ability of interested persons to obtain civil discovery under section 1782. *See, e.g., In re Application of Ishihara Chem. Co.*, 251 F.3d 120 (2d Cir. 2001); *In re Lancaster Factoring Co.*, 90 F.3d 38, 42 (2d Cir. 1996); *In re Request for Int'l Judicial Assistance (Letter Rogatory) for Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991).

Under the Ninth Circuit's holding below, by contrast, the statutory requirement of a "proceeding" before a "tribunal" is satisfied so long as there is some prospect of such a proceeding at some future—potentially distant—time. Pet. App. 6a. If this case had arisen in the Second Circuit rather than the Ninth, AMD's discovery request would have failed on this ground alone. As the Ninth Circuit acknowledged in rejecting any imminence requirement (*id.*), no quasi-adjudicative proceeding is pending now, and the next stage in the EC process (if there is one at all) is not "very soon to occur" even now, *Euromepa, S.A.*, 154 F.3d at 29, and certainly was not "very soon to occur" when the district court ruled. This case thus squarely engages the acknowledged conflict between the Second and Ninth Circuits. Certiorari is warranted for that reason alone, quite apart from the Ninth Circuit's related errors discussed below.

b. Whether or not a quasi-adjudicative proceeding must be "imminent" to warrant discovery under section 1782, the Ninth Circuit further erred by ruling that the present *non*-adjudicative investigation will someday be followed by a (non-imminent) proceeding that is properly characterized as "quasi-adjudicative." In this respect as well, the Ninth Circuit was mistaken.

Even if the EC were eventually to take more formal prosecutorial action on AMD's complaint, that second-stage process also would not qualify as a quasi-adjudicative "proceeding" before a "foreign or international tribunal." A

"proceeding" under section 1782 is one "in which an adjudicative function is being exercised." *Lancaster Factoring*, 90 F.3d at 41 (citation omitted). In determining whether a foreign entity qualifies as an adjudicative "tribunal" under section 1782, U.S. courts place particular emphasis on whether the entity maintains a separation of functions between prosecutors and decisionmakers. For example, in *In re Letters Rogatory Issued by Director of Inspection of Government of India*, 385 F.2d 1017 (2d Cir. 1967), Judge Friendly held for the Second Circuit that a "tribunal," for purposes of section 1782, typically maintains "separation between the prosecutorial and adjudicative functions." *Id.* at 1021.

The decision below is impossible to square with these well-settled principles. Even in the second, more formal phase of the complaint process, the EC does not conduct "adversary proceedings between the complainant and the [company] concerned." *AKZO Chemie*, [1987] 1 C.M.L.R. at 248 (3 E.R. 570). As in the first phase, a complainant has no discovery rights whatsoever and, indeed, has no right of access even to submissions made to the EC itself. 3 E.R. 501, 503. Moreover, if a hearing is held, no rules of evidence apply, and the EC makes no provision for taking testimony under oath, compelling the testimony of material witnesses, or cross-examining any witness. 3 E.R. 502-03. And, as to the Second Circuit's principal criterion for "tribunal" status under section 1782—namely, separation of prosecutorial and decisionmaking functions—the EC maintains no such separation: the same investigative staff that conducts "dawn raids" prepares the EC's decision. 3 E.R. 502.[4] Finally, European

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[4] The court below mistakenly assumed that an advisory committee of EC member states drafts the ultimate EC decisions as a neutral decisionmaker. Pet. App. 4a, 6a-7a. In fact, the EC advisory committee does not draft the EC's decisions, which are prepared instead by the investigative staff. 3 E.R. 498; *see* EC Regulation 17, Art. 10(5) (3 E.R. 529) (requiring notice to advisory committee to enclose "a preliminary draft decision"). Because the advisory committee performs only an "advisory task," moreover, it does not conduct an independent review of the evi-

law itself makes clear that the EC acts not as an adjudicator, but as a law enforcement agency investigating allegations of competition law violations. For example, the EC's Eleventh Report on Competition Policy emphasizes that the Commission's "procedure relating to restrictive practices and abuse of a dominant position is administrative and not judicial; it must not be turned into a trial." 3 E.R. 646; *see also AKZO Chemie*, [1987] 1 C.M.L.R. at 248 (3 E.R. 570) (Advocate General of the European Community's highest court concluding that the EC does not conduct "adversary proceedings between the complainant and the [company] concerned"); *Hasselblad (GB) Ltd.* v. *Orbinson*, [1985] 1 All E.R. 173, 181 (3 E.R. 703) (holding that "the [EC] is acting in a manner which is dissimilar to that of either civil or common law courts of justice" and is "better labelled as administrative rather than judicial or quasi-judicial").

In short, a second-phase EC inquiry, even if it were "imminent," could not qualify as a "proceeding" before a "tribunal" for purposes of section 1782. As a result, the prospect of any future "quasi-adjudicative" proceedings here is at best speculative (as well as non-imminent), because one possible outcome of the current non-adjudicative process is yet another non-adjudicative process.[5]

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dence gathered in the investigation and instead is merely "informed of the main points of fact and law" by the EC's staff. *Radio Telefis Eireann* v. *Commission*, [1991] E.C.R. II 485, 499-500 (attached to Intel C.A. Opp. to Mot. to Expedite at Tab 1); *see also* Article 10(6) of EC Regulation 17 (3 E.R. 529). And the EC is free to disregard the advisory committee's advice in any event. The court was also incorrect in assuming that an independent hearing officer issues a recommended decision to the EC. Pet. App. 4a. To the contrary, the hearing officer reports to the EC solely on "procedural issues." Commission Decision of May 23, 2001, 2001 O.J. (L 162/21), Art. 13 (emphasis added) (attached to Intel C.A. Opp. to Mot. to Expedite at Tab 2).

[5] If the EC eventually decides *not* to expend its prosecutorial resources by proceeding to this second stage, AMD could then appeal to a European court, which would exercise limited review of this *nol-pros* decision and, at most, would remand the matter back to the EC for addi-

III. This Case Presents Issues Of International Significance Warranting This Court's Review.

As discussed, the purpose of discovery under section 1782 is "to assist foreign and international tribunals, and the *litigants* before such tribunals." *Asta Medica*, 981 F.2d at 2 (emphasis added).[6] AMD is not a "litigant" in a pending adjudication, but a complainant to a law enforcement agency. Congress gave no indication that it intended to authorize discovery by private persons other than the single class it identified repeatedly in the legislative history of section 1782: litigants.[7] Indeed, Congress *could* have had no valid basis for giving complainants to foreign law enforcers greater discovery rights than complainants to domestic law enforcers, and the latter complainants possess *no* right to invade the files of the competitive rivals they accuse.

The Ninth Circuit's decision, however, makes nonsense of section 1782 in precisely this respect. It disregards fundamental differences between mere *complainants* to law en-

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tional investigation. The prospect of such an appeal, however, is both speculative and temporally remote, and of course it cannot somehow convert the current first-stage "pre-investigation" into a "proceeding" before a "tribunal." By analogy, decisions by the Department of Justice to take no action on a private party's antitrust allegations would not somehow become "quasi-adjudicatory" decisions of a "tribunal" if this Court were to overrule *Heckler* v. *Chaney*, 470 U.S. 821 (1985), and permit the federal courts to exercise limited review of the reasonableness of such decisions.

[6] *See also Lancaster Factoring*, 90 F.3d at 42 ("'interested person' includes 'a party to the foreign . . . litigation'"); *Trinidad & Tobago*, 848 F.2d at 1155 (unlike prosecutors, "a private individual may need to be a litigant in a pending proceeding in order to be an 'interested person'").

[7] *See* S. Rep. No. 88-1580, *reprinted in* 1964 U.S.C.C.A.N. at 3788 (explaining that Congress's intent was to aid "tribunals and *litigants*" in obtaining discovery, and notes that assistance is specifically "extended to international tribunals and *litigants before such tribunals*") (emphasis added); *see also id.* at 3789 (section 1782 "permits effective and desirable assistance to foreign and international courts and *litigants* before such courts") (emphasis added).

forcement agencies and actual *litigants*, who enjoy significantly broader rights. Unlike litigants, complainants have no obligation to plead a case that satisfies some legal sufficiency standard. Unlike litigants, complainants do not develop evidence for use at trial; they rely on government enforcers to develop evidence and bring a case. And, unlike litigants, they have no obligations toward opponents; indeed, they do not even serve them with a complaint. While filing a lawsuit before an adjudicative tribunal is a solemn undertaking that triggers ongoing obligations, a mere complaint to a law enforcement agency does not. Indeed, the EC took months to disclose to Intel even a *redacted* copy of AMD's complaint, and, to this day, AMD has not received a copy of Intel's response, and neither company has had notice of any of the other company's communications with or submissions to the EC in connection with the EC investigation.

The decision below thus vastly expands the class of persons who may seek section 1782 discovery, effectively rewriting the statute in a manner never contemplated by Congress. The decision opens the door to the taking of discovery by non-litigants who are unwilling to assume the burdens and obligations of being a litigant. It exposes individuals and businesses to costly fishing expeditions by rivals. And it subverts the foreign legal regime that section 1782 is designed to assist by flouting that regime's mandate that a complainant "may not in any circumstances be given access to documents containing business secrets" of a competitor lest it "lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets." *AKZO Chemie*, [1987] 1 C.M.L.R. at 259 (3 E.R. 575).

Indeed, the Ninth Circuit's decision threatens to open the specific floodgates that the European Court of Justice sought to close in *AKZO Chemie*, allowing any company to take discovery of its closest commercial rivals simply by asking a foreign enforcement agency to investigate them. It also enables any company to interfere with mergers subject to cross-border review by complaining to foreign law enforcers and

seeking discovery from merging competitors. Thousands of such transactions are reviewed each year by the EC and foreign enforcement agencies with similar procedures. Complainants to U.S. antitrust agencies have no right to take discovery of the accused party, but the Ninth Circuit has now conferred that right, under U.S. law, upon complainants abroad.

Moreover, permitting discovery under these circumstances serves no discernible interest of the foreign authority. As the court acknowledged, the EC is empowered to seek information directly from alleged infringers and to search their businesses through "dawn raids." *See* Pet. App. 3a-4a; 3 E.R. 499. It needs no help from AMD to obtain evidence from Intel. Indeed, the EC has no use for the documents sought by AMD; as noted, it turned down AMD's request that it seek those documents itself. *See* Supp. E.R. 6-7. The Ninth Circuit nevertheless concluded that "liberal discovery" (Pet. App. 8a) is needed to help AMD, a non-litigant, present documents to enforcers who do not want them. This makes no legal or policy sense whatsoever.

Finally, there is no clear textual basis for limiting the scope of the Ninth Circuit's decision to documentary, as opposed to testimonial, evidence. By its terms, section 1782 permits district courts not just to order U.S. entities "to produce a document or other thing for use" in a foreign proceeding, but also to order any "person . . . to give his testimony or statement" for the same use. Pet. App. 17a. Unlike U.S. jurisdictions, however, the EC has made a conscious and much-discussed decision to make no provision for compelling the testimony of individuals. *See* 3 E.R. 502-03; *see also* 3 E.R. 646 (EC determination that competition investigations must not be turned into trials). If, as the Ninth Circuit held, section 1782 contains none of the sensible limits enforced by the First, Second, Fifth, and Eleventh Circuits, the competitive rivals of U.S. companies could come to the United States to circumvent deliberate European restrictions

not just on documentary discovery, but on testimonial discovery as well.

In sum, by eviscerating the established principle that private persons must be litigants in adjudicative proceedings in order to obtain section 1782 discovery, the decision below violates the statutory requirement of a "proceeding" before a "tribunal," ignores the unavailability of pre-litigation discovery in civil cases, erroneously conflates criminal investigations and civil disputes, and flouts clear and repeated expressions of congressional intent. Unless this Court grants certiorari and reverses, the decision will impose, at the behest of non-litigants, onerous and often one-sided discovery burdens on U.S.-based individuals and businesses.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2002

APPENDICES

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APPENDIX A

United States Court of Appeals,
Ninth Circuit

ADVANCED MICRO DEVICES, INC., Petitioner-Appellant,
v.
INTEL CORPORATION, Respondent-Appellee.

No. 02-15070

Argued and Submitted May 15, 2002.
Filed June 6, 2002

[292 F.3d 664]

* * * *

[665] Before HAWKINS and SILVERMAN, Circuit Judges, and RESTANI,* Judge.

OPINION

MICHAEL DALY HAWKINS, Circuit Judge.

In a question of first impression with respect to the European Community, we must determine the scope and reach of 28 U.S.C. § 1782,[1] which permits domestic discov-

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* Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

[1] The statute provides:

§ 1782 Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be

ery for use in foreign proceedings. We face two questions: (1) whether the proceeding for which discovery is sought qualifies as "foreign or international tribunal"; and (2) if so, whether Section 1782 requires a showing that the information sought would be discoverable or admissible in that proceeding. Because we conclude that the proceeding for which the discovery at issue is sought meets the statutory definition, we reverse the district court. As the district court will now need to deal with the merits of the discovery request, we determine that Section 1782 does not impose a threshold requirement that the material also be discoverable in the foreign court.

Background Facts & Procedural History

Advanced Micro Devices, Inc. ("AMD") and Intel Corporation ("Intel") are worldwide competitors in the microprocessor industry. Believing that Intel was abusing its dominant market position in the European Common Market, AMD filed a complaint with the Directorate General-Competition ("Directorate") of the European Commission ("EC"). AMD's complaint, now in the preliminary investigative stage, alleges [666] that Intel's actions violate Article 82 of the Treaty establishing the EC ("the EC Treaty"). To support its complaint, AMD sought discovery under Section

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made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

28 U.S.C. § 1782.

1782, asking that Intel produce documents and transcripts of testimony from a proceeding in another district court, *Intergraph Corp.* v. *Intel Corp.*, No. CV 97-N-3023 (N.D. Ala.). Intel objected, contending that the matter before the Directorate was not a "proceeding in a foreign or international tribunal" within the meaning of Section 1782. The district court agreed with Intel and this timely appeal, which we advanced for argument, followed. We have jurisdiction pursuant to 28 U.S.C. § 1291.

ANALYSIS

Standard of Review

Questions of statutory interpretation are subject to de novo review while the district court's application of Section 1782 to the facts is reviewed for an abuse of discretion. *United States* v. *Sealed 1, Letter of Request for Legal Assistance from the Deputy Prosecutor Gen. of the Russian Fed.*, 235 F.3d 1200, 1203, 1206 (9th Cir. 2000).

Nature of Proceeding for which Discovery is Sought

AMD's complaint was filed under Article 82 of the EC Treaty and Article 3(2)(b) of EC Council Regulation. Article 82 generally prohibits "abuse by one or more undertakings of a dominant position within the common market." The Directorate is a sub-unit of the EC, authorized to enforce Article 82 by conducting investigations of alleged infringement, to propose curative measures in published decisions, and to impose fines and penalties. EC Treaty Art. 85.

Upon receipt of a complaint, the Directorate first conducts a preliminary investigation. It may gather information on its own and provide the complainant with an opportunity to support its allegations. This initial investigation is not considered an adversarial proceeding. *AKZO Chemie BV* v. *Commission*, 1 C.M.L.R. 231, 248 (E.C.J. 1986). The Directorate also has the authority to seek information directly from the alleged infringer and may punish a failure to provide information with fines and penalties. Council Regulation

17/64, arts. 11, 14. Within the EC, the Directorate also has the authority to enter and search an alleged infringer's business. Council Regulation 17/64, arts. 15(1)(b), 16(1)(c).

Completion of the Directorate's preliminary investigation results in a decision whether to pursue the complaint. If the decision is not to proceed, the complainant is advised and given an opportunity to submit further information in support of the allegations. *Koelman* v. *E.C. Comm'n*, [1996] 4 C.M.L.R. 636, 649 (Ct. of First Instance 1996). The EC then decides whether to formally proceed in a final written decision. A decision not to proceed is subject to review by the Court of First Instance and ultimately by the Court of Justice for the European Communities ("Court of Justice"), the court of last resort for EC matters. *Stork Amsterdam BV* v. *E.C. Comm'n*, [2000] 5 C.M.L.R. 31, 42 (Ct. of First Instance 2000).

A decision to proceed with the complaint operates on a slightly different track. If the EC makes a preliminary determination that infringement may have occurred, it serves a statement of objections on the alleged infringer and appoints an independent hearing officer to conduct a hearing. Commission Decision of 23 May 2001, 2001/462/EC; Council Regulation 17/64, art. 19; Commission Regulation 2842/98, arts. 10-14. The hearing officer then presents conclusions to the Directorate who, in turn, makes a recommendation to the EC on how to proceed. A decision by the EC to dismiss, like a Directorate decision [667] not to proceed after a preliminary investigation, is subject to review by the Court of First Instance. Commission Decision of 23 May 2001, arts. 13-16. If the EC decides to proceed with the complaint, a preliminary decision is drafted and forwarded to the EC Advisory Committee, which consists of representatives of the EC member states. The Advisory Committee drafts an opinion for the EC which, if adopted, becomes a final enforceable decision within the European Community. *Id.*; *Hasselblad* v. *Orbison*, [1985] Q.B. 475. 496 (1984).

We begin by noting that the language used by Congress in Section 1782 is broad and inclusive, including by way of example even criminal investigations prior to formal accusation. Nor does the text of Section 1782 suggest a distinction between civil and criminal proceedings. Our prior decisions also read the legislative history surrounding the adoption of Section 1782 broadly to include "bodies of a quasi-judicial or administrative nature" as well as preliminary investigations leading to judicial proceedings. *In re Letters Rogatory from Tokyo Dist.*, 539 F.2d 1216, 1218-19 (9th Cir. 1976); *see also United States* v. *Sealed 1*, 235 F.3d at 1204. We also noted that the 1964 amendments to Section 1782 eliminated the requirement that the foreign proceeding be "pending" and broadened the discretion of district courts to act on foreign assistance requests. *Id.*; *see also* S. Rep. No. 1580, § 9 (1963), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.[2]

Intel argues that the process for which AMD seeks discovery is purely administrative in nature, and, at least with respect to a recommendation to proceed to a complaint, pre-

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[2] The Senate stated:

> The word "tribunal" is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries.... In view of the constant growth of administrative and quasi- judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings. Finally, the assistance made available by subsection (a) is also extended to international tribunals and litigants before such tribunals. The assistance thus made available replaces, and eliminates the undesirable limitations of, the assistance extended by sections 270 through 270g of title 22, United States Code, which are proposed to be repealed.

liminary to a non-judicial proceeding. In the past, we have rejected applications for discovery where the "proceeding" was a commission of inquiry authorized to investigate, report and make recommendations to a non-judicial body. *In re Letters of Request to Examine Witnesses from Court of Queen's Bench for Manitoba, Canada*, 488 F.2d 511, 512 (9th Cir. 1973). But the Directorate makes its recommendations to the EC—a body authorized to enforce the EC Treaty with written, binding decisions, enforceable through fines and penalties. EC decisions are appealable to the Court of First Instance and then to the Court of Justice. Thus, the proceeding for which discovery is sought is, at minimum, one leading to quasi-judicial proceedings.

Nor need the proceedings be imminent, as Congress made clear through the elimination of the requirement that the proceeding be "pending." *United States* v. *Sealed 1*, 235 F.3d at 1205. Here the Directorate's investigation will lead to a decision whether to proceed. A decision not to go forward would be appealable to the Court of First Instance, thus "leading to a judicial proceeding." A decision to proceed with a complaint would lead to [668] hearings that are at least quasi-judicial in nature and then to an enforceable, judicially-reviewable decision.

Harkening to our own separation of powers traditions, Intel argues that the EC is not a tribunal because the distinction between prosecutor and decision-maker is blurred, if not non-existent. This might be of concern if the EC had a discernable institutional bias toward a particular outcome of the initial investigative process. *In re Letters Rogatory Issued by the Dir. of Inspection of India*, 385 F.2d 1017, 1020 (2d Cir. 1967) (Income Tax Officer with sole responsibility to make and then evaluate government's argument not a "tribunal" under § 1782). The EC process, however, takes care to permit both complainant and alleged infringer an opportunity for input to the eventual recommendation and inserts an independent entity—the EC Advisory Committee—between the Directorate's recommendation that a formal complaint be

issued and the EC's decision to file a final enforceable decision.

In sum, we agree that the EC is an administrative body and that the investigation being conducted by its Directorate is related to a quasi-judicial or judicial proceeding. AMD has the right to petition the EC to stop what it believes is conduct that violates the EC Treaty, to present evidence it believes supports its allegations, to have the EC evaluate what it presents and to have the resulting action (or inaction) reviewed by the European courts. Although preliminary, the process qualifies as a "proceeding before a tribunal" within the meaning of 28 U.S.C. § 1782.

Discoverability

Our determination that Section 1782 includes the proceedings for which AMD seeks discovery will require the district court to resolve the merits of AMD's discovery request. Bolstered by holdings from the First and Eleventh Circuits, Intel argues for the imposition of a threshold showing that AMD could obtain the discovery it now seeks in the EC proceedings. *In re Application of Asta Medica*, 981 F.2d 1, 5-7 (1st Cir. 1992); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988). The Second and Third Circuits refuse to impose such a requirement. *In re Application of Malev Hungarian Airlines*, 964 F.2d 97, 101-02 (2d Cir. 1992); *Euromepa, SA* v. *R. Esmerian, Inc.*, 154 F.3d 24, 28 (2d Cir. 1998); *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998). The remaining circuits to consider the issue distinguish between a request from a foreign tribunal and one from a private party, not imposing a threshold discoverability requirement on the former. *In re Letter of Request from Amtsgericht Ingolstadt, Fed. Republic of Germany*, 82 F.3d 590, 592-93 (4th Cir. 1996); *In re Letter Rogatory From First Court of*

First Instance in Civil Matters, Caracas, Venezuela, 42 F.3d 308, 310-11 (5th Cir. 1995).[3]

We have previously rejected a requirement regarding admissibility in the foreign tribunal. *In re Request for Judicial Assistance from Seoul Dist. Criminal Court*, 555 F.2d 720, 723 (9th Cir. 1977). [669] For good and sound policy reasons, we now reject such a requirement with respect to discoverability, be the request from a private party or foreign tribunal. We find nothing in the plain language or legislative history of Section 1782, including its 1964 and 1996 amendments, to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding. *Bayer*, 146 F.3d at 193; *Euromepa*, 154 F.3d at 28; *In re Application of Gianoli Aldunate*, 3 F.3d 54, 59 (2d Cir. 1993). Had Congress wished to impose such a requirement on parties, it could have easily done so. Judge McKeown's analysis with respect to any requirement that the foreign proceedings be "imminent" is persuasive in this regard. *See United States* v. *Sealed 1*, 235 F.3d at 1205.

Finally, allowance of liberal discovery seems entirely consistent with the twin aims of Section 1782: providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts. *Malev*, 964 F.2d at 100.

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[3] The topic has drawn considerable commentary in the academy, with most commentators preferring the *Euromepa* approach. Hans Smit, *Recent Developments in International Litigation*, 35 S. Tex. L. Rev. 215, 234-37 (1994); Peter Metis, *International Judicial Assistance: Does 28 U.S.C. § 1782 Contain an Explicit Discoverability Requirement?*, 18 Fordham Int'l L.J. 332, 360-67 (1994); Steven Saraisky, *How to Construe Section 1782: A Textual Prescription to Restore the Judge's Discretion*, 61 U. Chi. L. Rev. 1127, 1148-50 (1994); Walker Sanzone, *Extra-Statutory Discovery Requirements: Violating the Twin Purposes of 28 U.S.C. Section 1782*, 29 Vand. J. Transnat'l L. 117, 147-50 (1996).

Conclusion

The district court's determination that the proceeding for which AMD seeks discovery does not qualify under 28 U.S.C. § 1782 is reversed.[4] Because we also determine that there is no requirement that AMD show that what is sought would be discoverable in the proceedings before the European Commission, the district court may proceed to consider AMD's request on the merits.

REVERSED and REMANDED.

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[4] Obviously, district court opinions to the contrary are expressly overruled. *See, e.g., Application for Assistance in a Foreign Proceeding*, 147 F.R.D. 223 (C.D. Cal. 1993).

APPENDIX B

United States Court of Appeals,
Ninth Circuit

ADVANCED MICRO DEVICES, INC., Petitioner-Appellant,
v.
INTEL CORPORATION, Respondent-Appellee.

No. 02-15070
D.C. No. CV-01-07033-WAI
(Northern District of California, San Jose)

[Filed Sept. 3, 2002]

ORDER

Before: HAWKINS and SILVERMAN, Circuit Judges, and RESTANI,* Judge.

The panel voted to deny the petition for rehearing. Judges Hawkins and Silverman voted to deny the petition for rehearing en banc. Judge Restani made no recommendation on the en banc petition.

The full Court was advised of the petition for rehearing en banc and no active judge requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

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* Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

APPENDIX C

United States District Court
for the Northern District of California

ADVANCED MICRO DEVICES, INC., Applicant,
v.
INTEL CORPORATION, Respondent.

NO. C- 01-7033 MISC WAI

January 7, 2002, Decided
January 7, 2002, Filed

[2002 U.S. Dist. LEXIS 11511]

MEMORANDUM OF DECISION

Applicant ADVANCED MICRO DEVICES, INC. ("AMD") moves for an order directing Respondent INTEL CORPORATION ("INTEL") to produce documents and other material pursuant to 28 U.S.C. § 1782(a) which provides in pertinent part that

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . .

AMD seeks the production of documents and testimony elicited in discovery in the case of *Intergraph Corporation* v. *Intel Corporation*, CV-97-N-3023 NE, which was filed and conducted in the Northern District of Alabama, and which AMD contends had similar antitrust allegations and contentions to those of the instant case. The production of these materials is [*2] sought in and of AMD's complaint filed concerning INTEL with the Commission of European Communities ("COMMISSION") which among other duties is charged

with the enforcement and investigation of prohibited agreements which restrict or distort competition. European Treaty Articles 81 and 82.

The COMMISSION, in the conduct of an investigation, performs the functions of investigator, prosecutor and decision-maker without any separation.

In the instant case no Statement of Objections has been issued. The case is in the initial stage of preliminary inquiry.

Dr. Ingo Brinker, who is counsel for Applicant has indicated his opinion that the COMMISSION performs quasi-judicial functions "analogous to the Federal Trade Commission." Brinker Decl. 6.

Reliance is also placed by Applicant upon the opinion of Professor Hans Smit, one of the draftsmen of § 1782, that the COMMISSION exercises quasi-judicial powers and that § 1782 is applicable to proceedings in which those powers are exercised. Smit, *International Litigation Under the United States Code*, 65 Columbia L. Rev., 1015, 1026 n.71, 1027 n.3 (1965).

The COMMISSION has itself contradicted these assertions in its Eleventh [*3] Report on Competition Policy (1981) wherein it stated that "its procedures relating to restrictive practices and abuse of dominant position is administrative and not judicial; it must not be turned into a trial." Parr Decl. 15. Dr. Brinker's opinion as to the character of the COMMISSION's function is also contradicted by the Declaration of James B. Rill, a practitioner before the Federal Trade Commission "for over 30 years." Rill Decl. 5:20-22. Based upon his background and opinion, Mr. Rill concluded, ". . . it is clear to me that the European Commission's investigative and enforcement procedures are not at all comparable to the adjudicatory functions of the Federal Trade Commission and lack the qualities that make a proceeding 'adjudicative.'" Rill Decl. 6:1-3.

A "proceeding" within the meaning of § 1782 means one in which an "adjudicative function is exercised." *Lancaster*

Factoring Co., Ltd. v. *Mangone*, 90 F.3d 38, 41 (2d Cir. 1996).

Based upon the record now before the court, I conclude that Applicant's contentions are not supported by applicable authority, and the Application is therefore DENIED.

DATED: 1/7/02

WILLIAM A. INGRAM

United States[*4] District Judge

APPENDIX D

Statutory Provision

[28 U.S.C. § 1782]

§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Supreme Court, U.S.
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(5)

No. 02-572

IN THE

Supreme Court of the United States

INTEL CORPORATION,
Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

28 U.S.C. § 1782 authorizes a federal district court to grant discovery to "any interested person" for use "in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." The questions presented are:

1. Whether this Court should impose a nontextual temporal "imminence" requirement in § 1782 proceedings when no court of appeals has imposed that requirement under the current version of the statute.

2. Whether this Court should apply a nontextual limitation on § 1782 to authorize discovery only for private "litigants," when the only court of appeals to have considered the question has rejected that argument, and such a reading would be contrary to the plain language of the statute, which permits applications by "any interested person."

3. Whether this Court should apply a nontextual "threshold" requirement that the party seeking discovery show that the material is already discoverable in the foreign proceeding when there is no live, intolerable conflict in the judgments of lower courts on that issue.

RULE 29.6 STATEMENT

Advanced Micro Devices, Inc. is a publicly traded corporation. There is no parent or publicly held company that owns 10% or more of the corporation's stock.

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INTRODUCTION

28 U.S.C. § 1782 authorizes a federal district court to order a person to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." Respondent Advanced Micro Devices, Inc. ("AMD"), sought an order under § 1782 compelling the production of documents by petitioner Intel Corp. ("Intel"), for use in a proceeding in the European Commission ("EC") concerning alleged anticompetitive behavior by Intel. The district court denied the order solely on the ground that the EC proceeding is currently in a preliminary investigative stage. Pet. App. 14a-15a. The court of appeals reversed, holding that § 1782 does not impose an absolute bar to the issuance of an order when the foreign proceeding is at the investigative stage, so long as the investigation is related to judicial or quasi-judicial proceedings, as are the EC proceedings that will necessarily follow the conclusion of the current investigation. *Id.* at 5a-7a. The court of appeals further noted there is no threshold requirement that the material sought be discoverable in the foreign proceeding. *Id.* at 2a, 8a. Because the district court had not yet—and has not yet—exercised its discretion to determine whether any discovery order *should* issue pursuant to § 1782 under standard discovery rules, the court of appeals remanded for the district court to deal with "the merits of the discovery request." *Id.* at 2a.

This interlocutory decision does not merit review. Contrary to the breathless hyperbole of Intel and its amici, *see* Pet. 2 (decision "triggered full section 1782 discovery rights"); *id.* at 20 (decision "will impose . . . onerous and often one-sided discovery burdens"); Br. of Nat'l Ass'n of Mfrs. as *Amicus Curiae* in Support of Pet'r at 1 ("the Ninth Circuit's sweeping expansion of § 1782 discovery will inflict serious harms and lead to widespread abuse"); Br. of Chamber of Commerce as *Amicus Curiae* in Support of Pet'r at 2

(decision allows "nearly unlimited access to business documents and competitive plans"), as yet there are *no* discovery obligations imposed on Intel, onerous or otherwise. They certainly are not "one-sided": Intel has filed its own cross-application for discovery under § 1782. Because no judicial authority under § 1782 has yet been exercised, Intel's challenge to the exercise of such authority is purely hypothetical.

Nor do the questions addressed by the court of appeals merit review on their own terms. *No* court anywhere has accepted Intel's principal submission that § 1782 authorizes discovery only for a "litigant" in a "pending" judicial or quasi-judicial proceeding. That argument is contrary to the plain language and clear history of the statute, and every court to have considered the question agrees that discovery under the current version of § 1782 is authorized for "any interested person" during a foreign administrative, civil or criminal investigation, so long as the investigation is likely to result in judicial or quasi-judicial proceedings. Despite Intel's protestations, the indisputable fact is that the current investigation will *necessarily* lead directly to EC proceedings that are either judicial or quasi-judicial.

Intel's real argument is that such proceedings are not temporally "imminent." No circuit other than the Second has adopted a nontextual requirement that adjudicative proceedings be not just likely to occur—which is the case here—but "likely to occur very soon." Even the Second Circuit adopted that view only under a *prior* version of the statute, which has since been clarified so as clearly to reject any temporal "imminence" requirement. And the Second Circuit understood its requirement as *allowing* discovery during an investigative stage of a proceeding, which would authorize a § 1782 order here.

The court of appeals also addressed the question whether § 1782 requires a party seeking discovery to make a "threshold showing" that the materials would also be discoverable

in the foreign proceeding. Pet. App. 8a. The court answered that question no, correctly noting that "nothing in the plain language or legislative history" of the statute supports the imposition of such a requirement. *Id.* The supposed conflict asserted by Intel on this question rests ultimately on a single Third Circuit decision that the Third Circuit has recently made clear does *not* require threshold proof of discoverability. Especially in light of the current interlocutory, abstract posture of this case, the Court should await further percolation of this issue, which may well be resolved conclusively when other courts have an opportunity to address their misinterpretation of the earlier Third Circuit decision. Certiorari should be denied.

STATEMENT OF THE CASE

1. Petitioner Intel Corporation ("Intel") and Respondent Advanced Micro Devices ("AMD") are competitors in the microprocessor industry. AMD believes that Intel abuses its dominant position in the European Common Market in violation of Article 82 of the European Community Treaty, which forbids "[a]ny abuse by one or more undertakings of a dominant position within the common market." 3 E.R. 518.

The European Commission is responsible for enforcing that prohibition, *see* Article 85 (3 E.R. 519), and if it finds a violation, "it may by decision require" the party infringing Article 82 "to bring such infringement to an end," and can impose monetary fines and penalties on the infringer, Regulation 17, Articles 3(1), 15, and 16 (3 E.R. 526, 531-32).[1]

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[1] The EC's amicus brief asserts that the decision below "fundamentally misconstrues the nature of the European Commission." Br. of the Comm'n of the European Communities as *Amicus Curiae* in Support of Pet'r at 4 ("EC Br."). The EC does not point to a single statement in the Ninth Circuit decision that incorrectly describes the Commission's mandate or procedures. The Court of Appeals certainly recognized that the EC functions as a law enforcement agency and very clearly understood

Article 83 of the Treaty also grants the Commission regulatory power, 3 E.R. 518, and pursuant to that authority the Commission has set forth the procedures by which it adjudicates alleged infringements of Article 82. As relevant here, "natural or legal persons who claim a legitimate interest" can submit a complaint to the Commission alleging a violation of Article 82. 3 E.R. 526. AMD filed such a complaint against Intel on October 23, 2000.

Once such a complaint is filed, the Commission is obligated to begin an investigation to determine the merits of the complaint. 1 E.R. 10. The Commission can gather information from the alleged monopolist. The complaining party also has its own formal, independent right under the Article to participate in the investigation by submitting briefs, documents, or other information, as well as the testimony of witnesses and experts. *Id.* at 11.

If the Commission concludes that there is no infringement of Article 82, it must notify the complaining party of that fact, *id.* at 10-11; Regulation 2842/98, Article 6 (3 E.R. 537), and the complaining party is entitled to request a public hearing and access to the Commission's investigative file. 1 E.R. 11. The Commission then must consider any additional evidence or comments submitted by the complaining party, and if it still declines to pursue the complaint, the complaining party is entitled to seek judicial review of that decision in the Court of First Instance and then in the Court of Justice for the European Communities. *Id.* at 11, 13; Pet. App. 4a.

If the Commission decides to proceed with the complaint, the alleged infringer is given what is known as a "statement of objections" that specifies the alleged infringements. 1 E.R. 11. The alleged infringer has a right to a hearing and a right to comment on the statement. 1 E.R. 11;

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that "the Commission's status may not fit perfectly within concepts of United States law." *Id.*

Regulation 17, Article 19 (3 E.R. 532). The complaining party also has a right to submit briefs, documents, other evidence, and expert and witness testimony. 1 E.R. 11. The hearing is conducted before "an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings" and the Commission imposes further procedures designed to "ensure the independence of the hearing officer." Commission Decision of 23 May 2001, 2001/462/EC (3 E.R. 584). At the end of the hearing, the independent officer "shall report to . . . the Commission on the hearing and the conclusions he draws from it." *Id.*, Article 13(1) (3 E.R. 586).[2] The Commission then makes a final decision regarding the complaint. Specifically, the Commission will either issue a final, enforceable decision against the infringer, or it will dismiss the case. Pet. App. 4a. Both decisions are subject to judicial review. *Id.*; 1 E.R. 13.

2. 28 U.S.C. § 1782 authorizes a federal district court to grant discovery for use in a proceeding in a foreign tribunal. The current version of the statute reads in relevant part:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal, or upon the application of any interested person and may direct that the testimony or statement be given, or the document or thing be produced, before a person appointed by

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[2] While this report does include "observations . . . concern[ing] procedural issues," 3 E.R. 586, contrary to Intel's claim (Pet. 16 n.4), the report is not "solely" about those issues.

> the court. . . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

28 U.S.C. § 1782. The broad language of the current statute significantly modifies previous versions of this law.

One such change is the type of proceedings for which a district court may order discovery. In 1863, Congress authorized district courts to issue discovery orders only if they were to be used "in any suit for the recovery of money or property . . . in any court in any foreign country." Act of Mar. 3, 1863, 12 Stat. 769, 769. In 1948, Congress changed the statute to permit discovery orders to be used "in any civil action . . . in any court in a foreign country." Act of June 25, 1948, ch. 646, 62 Stat. 869, 949. In 1964, however, Congress again amended the statute, substantially expanding a district court's authority to grant discovery orders for use "in a proceeding in a foreign or international tribunal." Pub. L. No. 88-619, § 9, 78 Stat. 995, 997. Congress explained clearly why it made this change:

> A rather large number of requests for assistance emanate from investigating magistrates. The word "tribunal" is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries. . . . In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) therefore provides the pos-

> sibility of U.S. judicial assistance in connection with all such proceedings. Finally, the assistance made available by subsection (a) is also extended to international tribunals and litigants before such tribunals.

S. Rep. No. 88-1580, *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788. Professor Hans Smit—"the dominant drafter of, and commentator on, the 1964 revision of 28 U.S.C. § 1782," *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686, 689 (D.C. Cir. 1989) (R.B. Ginsburg, J.)[3]—confirmed the point: "The term 'tribunal' embraces all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026 n.71 (1965).

Congress also amended § 1782 in 1964 to permit discovery orders even before proceedings in a foreign tribunal are underway. While the 1863 statute authorized district courts to order discovery "to be used in any suit . . . *[p]ending* in any court in any foreign country," 12 Stat. at 769 (emphasis added), and the 1948 statute permitted discovery orders "to be used in any civil action *pending* in any court in a foreign country," 62 Stat. at 949 (emphasis added), the 1964 amendments to § 1782 specifically deleted the word "pending" from the statute. The word "pending" was eliminated

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[3] "Professor Smit functioned as the Director of the Project on International Procedure at the Columbia Law School beginning in June 1960. He also acted as the Reporter to the United States Commission on International Rules of Judicial Procedure, a body created by Congress first to study United States rules relating to litigation with international aspects, then to propose appropriate legislative reforms. The Commission's proposals [were] all . . . accepted by Congress without change . . . . Amended 28 U.S.C. § 1782 was one of the products of the Commission's efforts." *Crown Prosecution*, 870 F.2d at 690 n.2.

specifically "to facilitate the gathering of evidence *prior to the institution of litigation abroad.*" *International Litigation*, *supra*, at 1026-27 n.72 (emphasis added). "[I]t is not necessary for the proceeding to be pending at the time the evidence is sought, but only that the evidence is *eventually to be used* in such a proceeding." *Id.* at 1026 (emphasis added).

As if to emphasize that very point, Congress amended the law again in 1996, to make clear that a district court may grant a discovery order for use in a proceeding in a foreign or international tribunal "including criminal investigations conducted before formal accusation." Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486 (1996).[4]

3. On October 1, 2001, AMD filed an application under 28 U.S.C. § 1782 in the United States District Court for the Northern District of California. In its application, AMD sought an order directing Intel to produce documents for use in the proceedings before the Commission. Specifically, AMD sought documents that Intel had produced in a case in the Northern District of Alabama involving monopolizing charges against Intel, as well as transcripts of testimony provided in that case. AMD submitted evidence establishing that these documents are relevant to the EC proceedings, because they would impeach positions that Intel has taken with the Commission and support AMD's complaint that Intel abuses its dominant position. 1 E.R. 8.[5]

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[4] Congress liberalized the discovery available under § 1782 in other ways as well. The 1964 amendments permit "any interested person" to seek a discovery order, authorize orders to compel the production of a document or other tangible evidence, and eliminate the requirement that the United States be "at peace" with the nation in which the foreign proceeding occurs.

[5] The fact that EC investigators did not seek the documents themselves is utterly immaterial to AMD's right to rely upon them in subsequent adjudicative proceedings. *See infra* notes 8 & 9.

The district court denied AMD's application. It held that "[t]he case is in the initial stage of preliminary inquiry," and because that stage is not itself adjudicative, it is not a "proceeding" within the meaning of § 1782. Pet. App. 14a-15a.

The Court of Appeals reversed. It began by noting the many ways in which § 1782's amendments "broadened the discretion of district courts to act on foreign assistance requests." Pet. App. 5a. Specifically, the court observed that "the language used by Congress in Section 1782 is broad and inclusive, including by way of example even criminal investigations prior to formal accusation." *Id.* The court also noted that Congress had deleted the word "pending" from the statute, and had chosen the expansive word "tribunal" so that § 1782 would "include bodies of a quasi-judicial or administrative nature as well as preliminary investigations leading to judicial proceedings." *Id.* at 5a & n.2 (internal quotation marks and citations omitted).

The court then held that because the Commission is "authorized to enforce the EC Treaty with written, binding decisions, enforceable through fines and penalties" and because its "decisions are appealable to the Court of First Instance and then to the Court of Justice . . . the proceeding for which discovery is sought is, at a minimum, one leading to quasi-judicial proceedings." *Id.* at 6a. The court further held that those proceedings do not have to be "imminent," noting that Congress made that result "clear" when it eliminated the word "pending" from the statute. *Id.* Because the Commission's investigation "will lead to" a judicial or quasi-judicial proceeding, discovery is permissible under § 1782. *Id.*

As to discoverability, the court below found "nothing in the plain language or the legislative history of Section 1782, including its 1964 and 1996 amendments, to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." *Id.* at 8a. Having determined that the district court was authorized

to grant AMD's request under § 1782, the court of appeals remanded the case to the district court to "proceed to consider AMD's request on the merits." *Id.* at 9a. The court subsequently denied a request for a stay of the order, but the district court has not yet taken any action on AMD's request. Intel has, however, itself sought to invoke § 1782, filing a cross-application for discovery from AMD. *See* Notice of Application and Cross-Application of Intel Corporation for Order Pursuant to 28 U.S.C. § 1782 (Case No. 01-7033) (N.D. Cal.) (filed Oct. 11, 2002). The magistrate just this week issued an order directing AMD to file a new application for discovery explaining "with reasonable particularity" the specific "items to be inspected," and limited to "documents that are relevant to the pending allegations." *See* Interim Order (Case No. 01-7033) (N.D. Cal.) (Dec. 11, 2002), *reprinted in* Appendix to this Brief in Opposition ("App.") at 6a (quoting Fed. R. Civ. P. 34). The judge scheduled a hearing on the parties' applications for January 10, 2003. *Id.*

REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied. The decision below comports in all respects with the plain language and legislative history of the statute; it is only Intel's views that contradict both the language and history of § 1782. While none of the questions Intel raises merits review individually, *see infra* Part II, there is a threshold vehicle problem that infects its entire petition: no court has exercised any power under § 1782, rendering Intel's challenge to the exercise of that power at this time speculative and premature.

I. CERTIORARI SHOULD BE DENIED BECAUSE THE CASE IS INTERLOCUTORY

The decision of the court of appeals reverses a threshold determination by the district court that § 1782 does not authorize consideration of AMD's application for discovery, and remands the case for consideration of AMD's application "on the merits." Pet. App. 9a. The district court's deci-

sion whether to grant discovery to either party (now that Intel has also invoked § 1782) is discretionary with that court. *See, e.g., Four Pillars Enters. Co. v. Avery Dennison Corp.*, 308 F.3d 1075, 1078 (9th Cir. 2002) ("Congress gave the federal district courts broad discretion to determine whether, and to what extent, to honor a request for assistance under 28 U.S.C. § 1782."). The court of appeals *did* reject Intel's submission that § 1782 erects certain absolute bars to the provision of *any* relief, but the court of appeals decision does not itself subject Intel to any discovery obligations under § 1782. It is only after the district court has issued an order compelling the production of documents—after the January 10, 2003 hearing, App. 6a—that there will be a final order in this case ripe for review by this Court.

By long-settled practice, this Court typically "await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., concurring in the denial of certiorari); *see Texas v. Hopwood*, 518 U.S. 1033, 1034 (1996) (Ginsburg, J., respecting denial of certiorari) ("we must await a final judgment on a program genuinely in controversy before addressing the important question raised in this petition"); *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (when a "case comes to us prior to the entry of a final judgment in the lower courts . . . we are ordinarily reluctant to exercise our certiorari jurisdiction"); *Bhd. of Locomotive Firemen v. Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"). There are no extraordinary circumstances warranting departure from the fundamental rule here. The decision below certainly is not "clearly erroneous under [this Court's] precedents," *Mazurek*, 520 U.S. at 975; not only is the decision below clearly correct under the language and history of

the statute, the petition does not identify even one precedent of this Court as affecting the resolution of the case. The decision below also does not act "immediately" on Intel, *see id.*; to the contrary, the entire purpose of the remand proceeding yet to occur is to decide *what* obligations, if any, are to be imposed. Nor does the decision below implicate any question of underlying jurisdiction. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 52 (1938).

This case illustrates the wisdom of the Court's standard practice. Because Intel's interpretation of § 1782 finds little or no support in the text or history of the statute, much of its plea for certiorari is premised on policy-type arguments against § 1782 discovery—arguments that cannot be fairly examined in the abstract, without a true record of discovery to review. Intel warns, for example, of "unfair discovery burdens," Pet. 3; "costly fishing expeditions," *id.* at 18; and "open[ing] . . . the floodgates," *id.* For the reasons elaborated below, we submit that these claims lack foundation even in theory. But even supposing an order under § 1782 could pose such problems, it is flatly impossible to evaluate such claims—and thus Intel's case for certiorari—where there has not yet been *any* discovery burden imposed on Intel. Unlike Intel, AMD fully expects that the district court in this case will act responsibly and in accordance with the usual rules governing discovery, demonstrating how § 1782 can be used in measured fashion to provide appropriate and relevant discovery. *See Four Pillars*, 308 F.3d at 1080 ("district courts are in the best position to review the details of a § 1782 request and to determine whether judicial assistance is justified" (alterations and internal quotation marks omitted)). The magistrate judge's recent interim order evinces exactly that kind of measured approach. App. 6a (requiring new application for discovery of documents specifically relevant to issues in European proceeding). If it does not turn out to be so, this Court can always review Intel's claims

later, on a *real* discovery record, as opposed to the hypothetical fishing expedition imagined by Intel and its amici.

The same is true for Intel's ominous declarations that the decision below stands as an "affront to principles of international comity," Pet. 3; "subvert[ing]" and "flouting" foreign tribunals, and "enabl[ing] any company to interfere with mergers subject to cross-border review," *id.* at 18. Again, the grievous wounds inflicted on foreign tribunals by the decision are, at this stage, imaginary at best. This case does not involve a cross border merger, and is no precedent for how § 1782 would apply to merger proceedings. Nor has there been any subversion or flouting of the EC. AMD takes the EC's position in this case very seriously, and would not be proceeding if the EC expressed any objection to the procedure AMD has invoked to obtain evidence to support its case against Intel or to consideration of the evidence that might be elicited. No such objection has been made.

To be sure, the EC does suggest that, as a more general matter, the decision below may threaten its "Leniency Program." EC Br. 6. That program encourages companies to reveal legal violations in exchange for leniency, and those disclosures remain confidential. *Id.* The threat to the Leniency Program perceived by the EC follows from a simple misunderstanding of this case and the decision below. The EC's submission is premised on its belief that the decision below authorizes courts "to routinely order the production of [Leniency Program] documents." *Id.* at 7. In fact, AMD does not seek *any* documents that were submitted to the EC—let alone Leniency Program documents—and no party contends that such documents are even arguably within AMD's discovery request. If Leniency Program materials were ever part of any discovery order actually issued by the district court below or any other, then the EC could intervene in those proceedings—as it has done in the past, *id.*—and the district court could respond appropriately. The EC cites no

instance in which a district court has failed to protect the EC's Leniency Program interests, and it suggests no reason for such concern here. *See Four Pillars*, 308 F.3d at 1079 ("If a district court is concerned that granting discovery under § 1782 will engender problems a particular case, it is well-equipped to determine the scope and duration of that discovery." (internal quotation marks omitted)). Again, if the district court (or court of appeals) somehow failed to protect Leniency Program confidentiality, this Court could review that decision at the appropriate time.

Of course, the EC will always retain control over the *admissibility* of documents in its proceedings, it can choose simply to ignore additional discovery obtained in the U.S. under § 1782. *See In re Application of Euromepa S.A.*, 51 F.3d 1095, 1101 (2d Cir. 1995) ("*Euromepa I*") (Calabresi, J.); *infra* at 27. But even if one paternalistically worries over the capacity of the EC to cope with the submission of evidence obtained in the United States, the force of such worries can be measured only by reference to *actual* discovery commanded by *actual* orders under § 1782. If the discovery ultimately ordered by the district court somehow appears to be a genuine insult to the EC proceedings, and the court of appeals does not address that problem, this Court can resolve that concern at the appropriate time.

In short, every reason of international comity cited by Intel cuts *against* reaching out to decide questions on a record that is purely abstract and hypothetical. The supposed geopolitical costs imposed by judicial application of the general § 1782 discovery power simply cannot be assessed meaningfully in a case lacking judicial application of that power. This Court should await a final order before even considering whether § 1782 would be improved by addition of the nontextual limitations Intel seeks.

II. THE QUESTIONS PRESENTED DO NOT MERIT REVIEW ON THEIR OWN TERMS

Not only is the decision below unripe for review, the questions Intel raises do not warrant certiorari on their own terms. In the order addressed in (or implicated by) the decision below, the questions properly presented are: (1) whether § 1782 authorizes discovery when no foreign judicial or quasi-judicial proceeding is "pending" or temporally "imminent"; (2) whether § 1782 authorizes discovery for "private, non-litigants"; and (3) whether § 1782 requires that a party seeking discovery make a threshold showing of the material's discoverability in the foreign proceeding for which it is to be used.

A. Certiorari Should Not Be Granted To Decide Whether Courts Should Apply A Nontextual Temporal "Imminence" Requirement In § 1782 Proceedings

1. Intel's first argument is that the court below erred in authorizing consideration of AMD's discovery request because no adjudicative-type proceeding is currently "pending" in the EC. The "most natural reading" of § 1782, says Intel, is that discovery is authorized "only if . . . a 'proceeding' is already underway before a foreign 'tribunal.'" Pet. 13.

That argument borders on the frivolous. As noted above, in 1964 Congress deleted the word "pending" from the statute for the *specific purpose* of allowing discovery of materials prior to the institution of litigation in the foreign jurisdiction. *See supra* at 7-8. Accordingly, every circuit that has addressed this question has agreed with then-Judge Ginsburg that the "judicial proceeding for which assistance is sought . . . need not be pending at the time of the request for assistance" before an order may issue under § 1782. *Crown Prosecution*, 870 F.2d at 687; *see In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991) ("*Brazil*");

In re Letters Rogatory from Tokyo Dist., 539 F.2d 1216, 1218 (9th Cir. 1976) ("*Tokyo*") (joined by Kennedy, J.).[6] On at least two separate occasions, the United States has also agreed that § 1782 "authorizes judicial assistance even in the absence of a pending foreign proceeding." Br. for Resp't at 8, *Azar v. Minister of Legal Affairs of Trinidad & Tobago*, 488 U.S. 1005 (1989) (No. 88-559); *see Brazil*, 936 F.2d at 706 (citing Brief for Appellee). There is thus no basis for review of the question whether a judicial proceeding must be "pending" before a discovery order may issue under § 1782.[7]

2. While it is clear that an adjudicative-type proceeding need not be "pending," all courts agree that § 1782 authorizes discovery during an investigation only so long as the investigation is connected to an eventual adjudicative proceeding. As the principal drafter of § 1782 explained, "[i]t is not necessary . . . for the proceeding to be pending at the

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[6] In *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151 (11th Cir. 1988) ("*Trinidad & Tobago*"), *cert. denied*, 488 U.S. 1005 (1989), the Eleventh Circuit held that proceeding need not be pending in a case involving a request by a foreign official, *id.* at 1154-55. In dicta the court suggested the result "may" be different for a private party, 848 F.2d at 1155, but the Eleventh Circuit has never held to that effect.

[7] The statute was recently amended to clarify that courts may order the production of documents for "use in a proceeding in a foreign or international tribunal, *including criminal investigations conducted before formal accusation*." If discovery is allowed for such pre-litigation proceedings as criminal investigations, there necessarily can be no requirement that litigation be "pending." Intel misunderstands this amendment as constituting a "limit[]" on "the category of investigations eligible for pre-litigation discovery," Pet. 13; in fact, the word "including" is an expansive term, not a limiting one. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001); *West v. Gibson*, 527 U.S. 212, 217 (1999) ("But the preceding word 'including' makes clear that the authorization is not limited to the specified remedies there mentioned."); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941) ("To attribute such a function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application.").

time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding." *International Litigation*, *supra*, at 1026. Accordingly, in an opinion joined by then-Judge Kennedy, the Ninth Circuit has held that it is enough for an applicant to show that information requested during an investigation "is for use in completion of the investigation and in future trials." *Tokyo*, 539 F.2d at 1218-19. Likewise, the D.C. Circuit, per then-Judge Ginsburg, held that "it suffices that the proceeding in the foreign tribunal and its contours be in *reasonable contemplation* when the request is made." *Crown Prosecution*, 870 F.2d at 687 (emphasis added); *see also Trinidad & Tobago*, 848 F.2d at 1156 ("The district judge should satisfy himself that a proceeding is very likely to occur.").

There is thus no dispute among the circuits that discovery is allowable under § 1782 during the investigative stage of a proceeding only if the investigation is connected to a likely adjudicative proceeding. Nor is there a genuine dispute here that the current EC investigation will result in such a proceeding one way or the other. As the court of appeals correctly concluded:

> Here the Directorate's investigation will lead to a decision whether to proceed. A decision not to go forward would be appealable to the Court of First Instance, thus "leading to a judicial proceeding." A decision to proceed with a complaint would lead to hearings that are at least quasi-judicial in nature and then to an enforceable, judicially-reviewable decision.

Pet. App. 6a; *accord In re Application of Nat'l Broad. Co.*, 1998 WL 19994, at *6 (S.D.N.Y. Jan. 21, 1998) ("intergovernmental tribunals such as the Court of Justice of the European Economic Community and administrative proceedings before the EEC Commission" qualify as "tribunals" under § 1782), *aff'd* 165 F.3d 184 (2d Cir. 1999). Indeed, the principal drafter of the 1964 amendment explained that the

change was intended to include the exact proceedings at issue in this case—that is, to "permit[] the rendition of proper aid in proceedings before the EEC Commission in which the Commission exercises quasi-judicial powers, including proceedings under Article 19 of Regulation 17." *International Litigation*, *supra*, at 1027 n.73; *see also supra* at 4-5 (describing alleged infringer's right to a hearing under Article 19 of Regulation 17).

Intel attempts to take issue in its petition with this consensus view of EC proceedings, but it does not seek review of the court of appeals' description of EC proceedings. It seeks only consideration of the question whether an adjudicative proceeding must be likely to occur *very soon*. Pet. 13. That such a proceeding will *in fact* occur upon completion of the investigation is not in doubt.

The EC's brief does not demonstrate to the contrary. The EC's submission is premised on the understanding that the decision below held that the current investigation is itself an adjudicative proceeding before a tribunal. EC Br. 4. The EC is mistaken. *See* Pet. App. 3a ("This initial investigation is not considered an adversarial proceeding."). What the court held is that the current investigation necessarily will lead to an adjudicative proceeding: either the quasi-judicial hearing that occurs if a statement of objections is issued, or the judicial review to which AMD is entitled if the statement is not issued. Pet. App. 6a. There is no serious question that those are both adjudicative in nature; indeed, they are the very "circumstances" in which the EC "function[s] as a 'tribunal,'" EC Br. 3, and in which its proceedings "partake of an adjudicatory character," *id.* at 4.[8] If the decision below holds

[8] Although the EC later states that it "*never* adjudicates disputes between parties," *id.*, and "does *not* adjudicate the rights of parties," *id.* at 5, it does acknowledge that it receives complaints, decides whether a violation of the law has occurred, and punishes the offender. *Id.* at 4-5. That is the very essence of adjudication, even if only one private party is

what the EC believes it holds, then there would have been no need to address the temporal "imminence" of the adjudicative-type proceedings, rendering that discussion dicta and the case an inappropriate vehicle for considering the temporal "imminence" question Intel presents.

3. In fact, the court of appeals correctly held that nothing in the text or history of the statute supports an artificial, per se "timing" limitation on the imminence of the adjudicative-type proceeding to which the investigation is connected. Pet. App. 6a. In so holding, the court followed its earlier precedent in *United States v. Sealed 1*, 235 F.3d 1200 (9th Cir. 2000):

> Focusing on the plain language of the statute, as we must, we note that the word "imminent" does not appear. Surely, had Congress wanted to authorize assistance to foreign investigations only when foreign proceedings are imminent, it could have said so. It is also impossible to read an imminence requirement into the statute following the 1996 amendment to § 1782 (authorizing assistance in "criminal investigations conducted before formal accusations") without

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directly involved. In any event, § 1782 does not require that AMD be a party to, or a "litigant" in, the proceeding before a foreign tribunal. *See infra* at 23-25. As the Ninth Circuit decision makes clear, even if proceedings before the EC are not adjudicative (and they are), those proceedings will lead to adjudicative proceedings, as the EC itself acknowledges. EC Br. 5 n.5. The whole point of this discovery proceeding relates to AMD's right under EC law to present the Commission with evidence. *Koelman v. E.C. Commission*, [1996] 4 CMLR 636, 649 (CFT (4th Chamber) 1996). If the Commission fails to give proper consideration to that evidence submitted by AMD, AMD is entitled as a matter of right to challenge the Commission's actions in the European courts. *BEUC v. E.C. Commission*, [1995] 4 CMLR 167 (CFI (2d Chamber) 1994). This is entirely different from the situation in the United States of a "person reporting an alleged violation of law to a public authority." EC Br. 5.

> leading to an absurd result. Appellant's insistence on "imminence" would create an untenable Catch-22 for foreign law-enforcement authorities seeking U.S. aid: investigators would be unable to receive such help before proceedings actually became imminent, and yet the proceedings might never become imminent because the investigators would be stymied in collecting evidence necessary to justify the filing of criminal charges.

235 F.3d at 1205.[9]

The only circuit to have endorsed any form of a temporal "imminence" requirement is the Second, but it did so under a previous version of § 1782, and it has yet to squarely address the question under the current version of the statute. The

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[9] Indeed, the present circumstances demonstrate precisely the "untenable Catch-22" that would result from a temporal "imminence" requirement. If the EC decides not to issue a statement of objections, AMD is entitled to seek judicial review of that decision, *see supra* at 4, but judicial review is based on the evidence before the EC. Thus, if AMD is not able to obtain the discovery it seeks now and to put that evidence before the EC's investigators—as is AMD's right under EC procedures—it will have no opportunity to have that evidence considered on judicial review. Yet Intel's temporal "imminence" requirement would prohibit AMD from getting the discovery it seeks until judicial review is underway (or at least very nearly so)—precisely when AMD can no longer introduce the evidence it seeks. That is, Intel reads § 1782 as authorizing AMD to obtain discovery only when its opportunity to introduce the evidence is over or very soon to be over.

That Catch-22 also demonstrates why Intel's repeated implication that EC investigators have not requested this information misses the point. AMD seeks to obtain the discovery in question so that it can submit it to the EC for inclusion in its investigative file. AMD is specifically given the right to submit evidence under EC procedures, which evidence AMD is entitled to rely upon in subsequent judicial review proceedings. Accordingly, even if the EC investigators themselves are not interested in that evidence, the EC's *courts*, upon judicial review, may find that discovery highly relevant.

Second Circuit first read a temporal imminence requirement into the statute in *Brazil*, 936 F.2d at 705-07. The court began by noting that the 1964 amendment to § 1782 "omits the qualifying word 'pending,'" but questioned "whether the deletion of 'pending' was intentional or inadvertent." *Id.* at 705. The Second Circuit reasoned:

> If the omission of "pending" was intended to mean "eventually occurring," we would expect to see at least some hint of that thought in the authoritative reports issued by the members of the Senate and House committees.

Id. at 706. Unable to find a snippet of legislative history confirming that the deletion of "pending" means that "pending" is no longer a statutory requirement, the Court reluctantly decided no longer to require that proceedings be "pending," but imposed a different—wholly extratextual—limitation on the statute, simply out of fear that the deletion of "pending" might have been accidental:

> Though we will not insist that proceedings be "pending," we think it prudent, in the absence of any indication as to why Congress deleted the word "pending" and in view of the distinct possibility that the deletion might have been inadvertent, to require that adjudicative proceedings be imminent—very likely to occur *and very soon to occur*.

Id. (emphasis added). The Second Circuit's "legislative accident" theory is inexplicable, not only because Congress is not normally presumed to delete material statutory terms for no reason, but also because we *do* have a contemporaneous record of the reason for the change. *See supra* at 7-8.

In any event, Congress has since provided all the "indication[s]" of its intent any court could need, making clear that deletion of the word "pending" has just the consequences the primary draftsman of the 1964 amendments intended and

other courts have recognized. Congress amended § 1782 in 1996 to make explicit that § 1782 discovery is available for proceedings in foreign tribunals "including criminal investigations conducted before formal accusation." *See supra* at 8. If the deletion of the word "pending" in 1964 had been accidental and therefore meaningless, the 1996 amendment would have made no sense. Quite plainly, if discovery is available "before" formal accusation, Congress could not have meant to require that discovery be available only for use in a "pending" foreign proceeding. *See supra* note 7.

The Second Circuit has had no occasion to squarely address its imminence requirement since the 1996 amendments. Its subsequent cases have all involved foreign litigation already pending or completed. *See In the Matter of Lancaster Factoring Co.*, 90 F.3d 38, 42 (2d Cir. 1996) (pending); *In re Euromepa S.A.*, 154 F.3d 24, 29 (2d Cir. 1998) ("*Euromepa II*") (completed); *In re Application of Ishihara Chem. Co.*, 251 F.3d 120, 125-26 (2d Cir. 2001) (completed); *cf. In re Application of Esses*, 101 F.3d 873, 875 (2d Cir. 1996) ("imminence" issue dropped from case). The Second Circuit thus has not yet addressed how it would construe the *current* version of § 1782 in the context of a *future* proceeding in a foreign tribunal. *See Ishihara Chem.*, 251 F.3d at 126-27 (declining to address question of future proceeding because not raised below).

In any event, the Second Circuit's supposed imminence requirement would not have produced a different result in this case. Just two years after discovering the requirement in *Brazil*, the court addressed it in *In re Erato*, 2 F.3d 11 (2d Cir. 1993). In that case, the Netherlands requested a district court order for the testimony of a witness for use in a criminal "investigation." *Id.* at 12. The witness whose testimony was sought, however, argued that the "proceeding in the Netherlands is investigative at this stage, rather than judicial," and thus § 1782 was not available. *Id.* at 15. In re-

sponse to that argument, the Second Circuit expressed "doubt" about its "force," noting that § 1782 "permits judicial assistance even where adjudicative proceedings are not pending as long as they are imminent." *Id.* If discovery for an "investigation" in the Netherlands could satisfy the court's "imminence" test, then it is difficult to fathom how the investigation currently underway before the European Commission would fail that test, assuming the requirement continues to exist at all. Even the Second Circuit's outmoded temporal imminence requirement, in other words, would not change the result of this case.

Accordingly, there is no live, intolerable split in the circuits of consequence to this case on the question whether § 1782 includes a temporal imminence requirement. There is therefore no basis for review of this issue.

B. Certiorari Should Not Be Granted To Decide Whether Courts Should Apply A Nontextual Limitation On § 1782 To Authorize Discovery Only for Private "Litigants"

Intel also urges review on the ground that AMD is not currently a "litigant" in an EC proceeding, but a "complainant" in the current investigative stage of the proceeding, and "Congress gave no indication that it intended to authorize discovery by private persons other than . . . litigants." Pet. 17. In truth, the plain text of the statute gives the clearest possible indications that it is *not* limited to "litigants" in foreign proceedings. As discussed above, deletion of the word "pending" demonstrates that there need not be any *current* foreign proceeding in which an applicant could be a litigant. *See supra* at 15-16. The statute explicitly confirms the point, providing that a district court may grant a discovery order

"upon the application of *any interested person*"—as opposed to "the application of a *litigant*."[10]

Not only is the suggestion that the statute is limited to "litigants" patently meritless,[11] it has generated no controversy in the lower courts. Only one court of appeals has addressed this issue expressly. In *Trinidad & Tobago*, the party opposing a § 1782 discovery order pointed to isolated instances in the legislative history where Congress used the word "litigant," and argued from those instances that § 1782 should be confined to requests made by litigants. Intel points to similar legislative history here. Pet. 17 n.7.[12] Although Intel cites *Trinidad & Tobago* favorably, that court actually *rejected* an argument essentially indistinguishable from Intel's: "Congress did *not* use the word 'litigant' [in the legislative history] to encompass all types of 'interested persons,' but used the word as a common example of an 'interested

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[10] Article 82 of the EC Treaty, which permits any "natural or legal persons who claim a legitimate interest" to submit a complaint to the EC, *see supra* at 4, uses language similar to § 1782, which permits "any interested person" to apply for a discovery order. Moreover, as noted above, *supra note* 9, AMD's "interest" under EC rules constitutes direct procedural rights, including a right of appeal. A party with a vested right of appeal, if not a litigant, has a direct stake in the proceeding.

[11] Intel tries to support its argument (Pet. 13) by analogy to an entirely separate statute (15 U.S.C. § 6203(a)) that authorizes civil discovery in antitrust cases upon application by the Attorney General. Intel contends that because this entirely separate statute limits discovery to applications by the Attorney General, if § 1782 were intended to confer discovery rights to "*private* entities," then Congress "would have done so." Pet. 13. Congress *did* do so, rather clearly: § 1782 authorizes a court to order discovery upon request by "any interested person."

[12] Intel also relies (Pet. 17 n.6) upon *In the Matter of Lancaster Factoring Co.*, 90 F.3d 38, 42 (2d Cir. 1996), which merely repeats the same legislative history.

person.'" 848 F.2d at 1155 (emphasis added).[13] This question does not merit review.

C. Certiorari Should Not Be Granted To Decide Whether Courts Should Apply A Nontextual "Threshold" Requirement That The Party Seeking Discovery Show That The Material Is Already Discoverable In The Foreign Proceeding

After rejecting the district court's mistaken conclusion that a § 1782 order would be improper merely because the EC proceedings are currently in their investigative stage, the court of appeals went on to reject Intel's additional argument that AMD should be required to prove that the requested materials would be discoverable in the EC proceeding.[14] "[N]othing in the plain language or legislative history of Sec-

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[13] The court did go on to suggest that "a private individual may need to be a litigant in a pending proceeding in order to be an 'interested person," 848 F.2d at 1155, but that question was not before the court in the case, which involved a request from a foreign official. Accordingly, this statement is simply dictum—and equivocal dictum at that, stating no more than that a private individual "may" need to be a litigant. Intel also points (Pet. 17) to a First Circuit decision that says simply this: "Pursuant to 28 U.S.C. § 1782(a), district courts are authorized to assist foreign and international tribunals, and the litigants before such tribunals, in obtaining discovery in the United States for use in proceedings abroad." *In re Application of Asta Medica S.A.*, 981 F.2d 1, 2 (1st Cir. 1992). That is not a holding on any issue, nor does Intel claim it to be.

[14] It is undisputed that the material is discoverable under EC law in the sense that the EC could require its production. Intel argues that the EC could not require production of *business secrets*, Pet. 10-11 (citing *AKZO Chemie BV v. E.C. Comm'n*, [1987] 1 C.M.L.R. 231, 259 (3 E.R. 575)), but there has been no finding in this case that the materials AMD seeks are, in fact, "business secrets," and AMD expressly stated to the district court that its request for discovery did not include any business secrets, *see* Supp. E.R. at 11-12 ("We're quite willing to work with Intel to avoid having them dump on us a massive amount of irrelevant material. . . . We're certainly not interested in Intel's business secrets. . . . So the concept that we're somehow interested in look at Intel's business secrets . . . is a straw man.").

tion 1782," the court explained, "require[s] a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." Pet. App. 8a.

Both the Second and Third Circuits agree with the decision below that "imposing a requirement that the materials sought be discoverable in the foreign jurisdiction would be inconsistent with both the letter and spirit of the statute." *In re Bayer AG*, 146 F.3d 188, 193 (3d Cir. 1998); *see In re Application of Gianoli Aldunate*, 3 F.3d 54, 57 (2d Cir. 1993) ("*Aldunate*"). As the Second Circuit has explained:

> The statutory language is unambiguous in its requirements [and] makes no reference whatsoever to a requirement of discoverability under the laws of the foreign jurisdiction. Indeed, the only language in section 1782 arguably relevant to the issue of whether the district court must adopt the discovery requirements of the foreign jurisdiction is permissive language, stating that the practice and procedure prescribed by the district court "*may* be in whole or part the practice and procedure of the foreign country or the international tribunal." . . . [W]e are not free to read extra-statutory barriers to discovery into section 1782.

Aldunate, 3 F.3d at 58-59 (citation omitted). The legislative history is also "devoid of any indication that Congress intended to limit the scope of § 1782 to those situations in which the discovery sought would be discoverable under the laws of the foreign jurisdiction." *Bayer*, 143 F.3d at 193. The principal drafter of the statute has confirmed the purpose reflected in the plain text: "Under the laws of many foreign countries, parties may not be heard as witnesses and party statements are not considered testimony. By specifically referring to statements, Section 1782 makes clear that the district court may order that parties and other persons, whose statements do not qualify as testimony under foreign prac-

tice, may be heard." Smit, *International Litigation*, *supra*, at 1026; *see also* Smit, *Recent Developments in International Litigation*, 35 S. Tex. L. Rev. 215, 234-38 (1994) (statute intended to make discovery available where the same would not be discoverable under foreign law). In short, "[i]f Congress had intended to impose an additional element as restrictive as a requirement that the materials sought be discoverable in the foreign jurisdiction, it would have done so explicitly." *Bayer*, 146 F.3d at 193.

Congress's decision not to include a rigid discoverability requirement reflects sound policy judgments—judgments committed to Congress, not the courts. Congress reasonably concluded that, as Judge Calabresi explains, "making the extension of American assistance dependant on foreign law would open a veritable Pandora's box" as "a request for cooperation [would] turn into an unduly expensive and time-consuming fight about foreign law," and become "a battle-by-affidavit of international legal experts" likely to result in a "superficial" analysis of foreign law. *Euromepa I*, 51 F.3d at 1099 (citation omitted). Nor would Congress have been concerned that § 1782 discovery would work an affront to foreign jurisdictions by allowing parties to "side-step foreign discovery limitations." Pet. 9. Foreign courts "can quite easily protect [themselves] from the effects of any discovery order by [a] district court that inadvertently offend[s] [foreign] practice" by exercising their own rules of admissibility. *Euromepa I*, 51 F.3d at 1101.

The court of appeals' decision to follow these courts in declining to imprint a nontextual discovery requirement onto § 1782 does not merit review by this Court. As noted above, there is as yet no actual discovery order, rendering it impossible to evaluate fairly many of Intel's claims about the policy significance of a discoverability requirement. For instance, even though EC investigators have *thus far* declined to seek the requested documents themselves, it is impossible

to know what these investigators' reaction would be upon actually seeing the documents, should they prove especially probative. And as already explained (*supra* note 9), the fact that EC investigators have not yet sought the documents tells us nothing at all about how the EC *courts* would value the documents, once AMD submits them as it is entitled to do under EC procedures. The most reasonable presumption is that courts would *not* arbitrarily ignore probative evidence submitted by AMD: "[A]lthough a foreign court might not compel production of the evidence in the manner employed by an American court, it might very well, and ordinarily would, readily accept and rely on the evidence obtained with the help of the American court." Smit, *Recent Developments*, *supra*, at 236. In short, the assumption that § 1782 discovery would be "inconsequential" to the EC proceeding—the assumption on which Intel predicates both its plea for review and its argument on the merits—cannot be meaningfully tested in the complete absence of any actual record of what documents Intel actually would be ordered to produce.

Finally, there is no intolerable conflict in the judgments of the relevant circuit court decisions. Intel cites an opinion of the Fifth Circuit as evidencing a conflict, but the holding of the case is in alignment with the court below. *See In re Letter Rogatory from First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d 308, 310 (5th Cir. 1995) (holding that in § 1782 request from foreign court, "no such discoverability determination is required").[15] Intel also

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[15] The court did think that *other* courts have "undertaken a discovery determination when the request for information comes from a private litigant," 42 F.3d at 310, but this was not the issue before the Fifth Circuit, and the court made no ruling on that question. The court in *In re Application of Time, Inc.*, 1999 WL 804090 (E.D. La. Oct. 6, 1999), agreed that "the Fifth Circuit's statement about private litigants was dictum," and went on to hold that the judgments of the Second and Third Circuits are "persuasive." *Id.* at *3. That decision was summarily af-

cites the Eleventh Circuit's decision in *Trinidad & Tobago*. Pet. 9. That case did not focus on the question of discoverability at all. The question before the court was whether § 1782 requires that a foreign proceeding be "pending," a position the court rejected. 848 F.2d at 1152. The court went on, however, to explain that the district court had not abused its discretion in ordering production because the documents were discoverable in the foreign jurisdiction. *Id.* at 1156. In dictum the court suggested that a district court must make such a determination, *id.*, but the only circuit precedent cited by the court was a Third Circuit case, *John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985), which the Third Circuit itself later expressly held did *not* establish any discoverability requirement, *Bayer*, 146 F.3d at 193 ("This case presents us with our first opportunity to revisit our opinion in *John Deere*, and we use the occasion to make explicit our view that imposing a requirement that the materials sought be discoverable in the foreign jurisdiction would be inconsistent with both the letter and spirit of the statute."). The Third Circuit even cited *Trinidad & Tobago* specifically as having misunderstood *John Deere*. *See* 146 F.3d at 193. The Eleventh Circuit has not had the opportunity address this evisceration of the only circuit precedent cited in support of the *Trinidad & Tobago* dictum.[16] Further

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firmed by the Fifth Circuit. 209 F.3d 719 (5th Cir. 2000) (unpublished decision).

[16] The Eleventh Circuit cited the *Trinidad & Tobago* dictum in *United Kingdom v. United States*, 238 F.3d 1312, 1319 (11th Cir. 2001), cert. denied 534 U.S. 891 (2001), but it was equally immaterial to the outcome there: the court below had found that the material was discoverable, but denied discovery for other reasons. *Id.* at 1319. *In re Lo Ka Chun*, 858 F.2d 1564 (11th Cir. 1988) (cited in Pet. 9), reversed a district court for making "no determination as to the discoverability of the evidence contemplated herein." *Id.* at 1566 (emphasis added). *Lo Ka Chun* relied on *Trinidad & Tobago*, but was decided before the Third Circuit held that *Trinidad & Tobago* misconstrued Third Circuit precedent.

percolation could easily resolve the issue in the Eleventh Circuit.

The same is true for the asserted conflict with the First Circuit's opinion in *In re Application of Asta Medica S.A.*, 981 F.2d 1 (1st Cir. 1992). Pet. 8-9. In holding that the district court was required in that case to determine the discoverability in the foreign jurisdiction of the requested material, the only circuit court holdings relied upon by the First Circuit were the Third Circuit's *John Deere* opinion and the Eleventh Circuit opinions mistakenly interpreting *John Deere* as requiring proof of discoverability. *See* 981 F.2d at 6. In *Bayer*, the Third Circuit also cited *Asta Medica* as having misinterpreted *John Deere*'s holding. *See* 146 F.3d at 193. Like the Eleventh, the First Circuit has not yet had occasion to revisit the issue in light of *Bayer*; accordingly, further percolation could resolve the issue in favor of the statute's plain text the First Circuit as well.

In short, the alleged circuit split on the question whether courts should read a rigid requirement of discoverability into the text of § 1782 turns out to be more anticipated than real, depending on whether the First and Eleventh Circuits continue to adhere to their erroneous reading of *John Deere* and the statute. The discoverability thus would not merit review at this time in any case, much less in this one, where the issue is presented only hypothetically, on the basis of a nonexistent record. The last time the same set of cases was presented to the Court as constituting a division in authority warranting certiorari, *see* Pet. for a Writ of Cert., *Foden v. Gianoli Aldunate* (No. 93-513), the Court denied the writ, *Foden v. Gianoli Aldunate*, 510 U.S. 965 (1993). There is all the more reason to do the same here.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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Dated: December 13, 2002

APPENDIX

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ADVANCED MICRO DEVICES, INC., Appellant, v. INTEL CORPORATION, Respondent.	No. C 01-7033 MISC JW (HRL) INTERIM ORDER

Advanced Micro Devices (AMD) has applied for an order directing Intel Corporation (Intel) to produce documents pursuant to 28 U.S.C. § 1782. Having considered the moving papers and supporting documents in this case, the Court orders AMD to submit a more specific request and continues the hearing date as discussed below.

I. BACKGROUND

A. The European Commission Complaint

On October 23, 2000, AMD filed a complaint with the European Commission against Intel for engaging in anti-competitive behavior in violation of European competition laws. (See AMD's Application for Order, dated 10/1/01). Specifically, the complaint alleged that Intel abused its dominant position in the Windows capable microprocessor market through: (1) granting loyalty rebates and imposing exclusive purchasing obligations on manufacturers of personal computers and retailers; (2) pricing discrimination and refusing to supply necessary components [to] new Intel products and product information to manufacturers as retribution for buying from AMD; and (3) entering into standard-setting cartels with other manufacturers to the competitive

injury of firms net allowed timely access to the standard specifications. (See AMD's Application for Order, dated 10/1/01).

Under European Commission procedure, the complaining party is to provide supporting evidence to its claims, and the Commission has the power to require the respondent company to produce documents. (Brinker Decl. ¶¶ 14 & 8). In the present case, the Commission submitted written questions to Intel regarding AMD's allegations. (Lynch Decl. ¶ 3). AMD was provided with a redacted copy of this response and engaged Professor Jeffrey MacKie-Mason to make an economic evaluation of Intel's position. (Lynch Decl. ¶¶ 3 & 4).

Professor MacKie-Mason had served as an economic consultant to Intergraph Corporation in an action in the Northern District of Alabama, *Intergraph Corporation v. Intel Corporation*, CV 97-N-3023-NE. (Lynch Decl. ¶ 1 4). Through this collaboration, AMD alleges that it became aware that certain documents produced in the *Intergraph* action would impeach Intel's positions in the current matter or would support AMD allegations. (Lynch Decl. ¶ 4).

B. AMD's Application Under 28 U.S.C. § 1782

On October 1, 2001, AMD filed an application for an order directing Intel to produce documents pursuant to 28 U.S.C. § 1782. Specifically, AMD sought an order directing Intel to "produce in electronic format, the Intel documents produced to Intergraph Corporation in the case of Intergraph Corporation v. Intel Corporation, CV 97-N-3023-NE, United States District Court for the Northern District of Alabama, Northeast Division (the "Intergraph case") and the transcripts of depositions of Intel employees taken in the Intergraph case." (See AMD's Application for Order, dated 10/11/01).

C. The District Court and Ninth Circuit Rulings

AMD's application was heard by Judge William Ingram. On December 11, 2001, Judge Ingram denied AMD's request and issued a memorandum of decision on January 7, 2002. Judge Ingram agreed with Intel that 28 U.S.C. § 1782 did not apply in this case. AMD appealed to the Ninth Circuit.

In an opinion filed on June 6, 2002, the Ninth Circuit reversed the district court, holding that the proceeding at issue here qualified as a "proceeding before a tribunal" under 28 U.S.C. § 1782. Advanced Micro Devices, Inc. v. Intel Corp., 292 F.3d 664, 668 (9th Cir. 2002). The Ninth Circuit remanded the case for determination of AMD's request on the merits. Id. at 669. On September 24, 2002, the Ninth Circuit denied Intel's request to stay issuance of the mandate pending the filing and disposition of a petition for a writ of certiorari. On October 2, 2002, AMD noticed a hearing to renew its application under 28 U.S.C. § 1782.

D. Intel's Objections to Production

Intel has objected to the production on the grounds that the documents sought are irrelevant, that AMD's request is overbroad and unduly burdensome, that the burden and expense of compliance with the request outweigh the benefit, that the discovery sought will not assist the European Commission, and that the proposed protective order offers insufficient protection. Additionally, Intel has submitted published reports that the European Commission closed its investigation of Intel. (See Intel's Supplemental Opposition). Intel notes that AMD has filed additional allegations, but that it is unaware of the substance of those allegations. (See Intel's Supplemental Opposition). AMD has not provided the court with an explanation of which allegations, if any, are presently before the European Commission.

E. The Intergraph Case

Intel has informed the court that the Intergraph case included claims for patent infringement, state law violations, and antitrust claims. (Bernhard Decl. ¶¶ 3-5). The antitrust claims asserted that: (1) Intel's decision not to supply Intergraph with the patented Intel sample and pre-release microprocessors constituted monopolization of the microprocessor market; (2) Intel violated Section 2 of the Shearman Act by using its monopoly in microprocessors to leverage a competitive advantage in the downstream markets of workstations, graphics accelerators and chipsets; and (3) Intel conspired with Intergraph workstation competitors to hinder Intergraph's sale of workstations to a few specific accounts engaged in the digital animation business. (Bernhard Decl. ¶ 14). Supposedly, Intergraph made no allegations with respect to Intel's conduct in Europe. (Bernhard Decl. ¶ 6).

Intel has also advised the court of the immense scope of discovery in the Intergraph case. Specifically, Intel was served with approximately 603 request for .production and made available fur inspection approximately 1,455 boxes of documents totaling 2.75 million pages. (Bernhard Decl. ¶¶ 16 & 28). Intergraph deposed sixty Intel employees and received other deposition transcripts from Intel employees from a FTC case. (Bernhard Decl.¶ 31). Intel argues that 60% of the document requests sought documents related solely to the patent disputes and a large portion of the remaining requests focused on documents regarding the parties' business relationship and dealings. (Bernhard Decl. ¶ 21). (Interestingly, Intel does not say for how many of the 603 document requests did it actually produce, and in what quantity, responsive documents.)

II. LEGAL STANDARD

28 U.S.C. § 1782 provides in relevant part, "The district court of the district in which a person resides or is found may order him . . . to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . . The order may be made . . . upon application of any interested party . . . ." The court has broad discretion to grant or deny such an application. Four Pillars Enterprises Co. v. Avery Dennison Corp., 308 F.3d 1075, 1078 (9th Cir. 2002). Courts have looked to the Federal Rules of Civil Procedure for guidance in exercising this discretion. See 28 U.S.C. § 1782 (referencing the Federal Rules of Civil Procedure); In re Letters Rogatory from the Tokyo Dist. Prosecutor's Office, Tokyo, Tanan (Okubo), 16 F.3d 1016 (9th Cir. 1994) (considering appellants' argument that evidence was taken in violation of the Federal Rules of Civil Procedure); In re Application of Edelman, 295 F.3d 171, 181 (2d Cir. 2002) (remanding for consideration of whether Rule 45 barred a deposition, even after determining that 28 U.S.C. § 1782 applied).

III. CONCLUSION

The Court is prepared to address the merits of Advanced Micro Devices' (AMD) request pursuant to 28 U.S.C. § 1782 for production of documents produced by Intel Corporation in the Intergraph case. However, as currently framed, AMD's request is overbroad. Requiring Intel now to produce all of its documents produced and all deposition transcripts of its employees taken in the Intergraph case would undoubtedly include some (perhaps, many) documents and transcripts that have no connection or relationship to the proceedings before the European Commission. Stated differently, AMD does not show that it should have all the documents and deposition transcripts. Accordingly, the Court orders as follows:

1) By December 31, 2002, AMD shall file an amended application pursuant to 28 U.S.C. § 1782. This application

shall explain, with reasonable particularity, AMD's allegations presently pending before the European Commission. Further, it "shall set forth, either by individual item or by category, the items to be inspected and describe each with reasonable particularity" and be limited to documents that are relevant to the pending allegations. Fed. R. Civ. P. 34.

2) Any opposition or objection to AMD's amended application shall be filed by January 7, 2003.

3) AMD's reply, if any, shall be filed by January 9, 2003.

4) The Court shall hear this matter on January 10, 2003 at 10:00 a.m. in Courtroom 2. At that time, the Court will also hear argument on Intel's contingent request for document production. The previous hearing date of December 17, 2002 at 10:00 a.m. is vacated.

5) The parties may submit a proposed protective order to a document production, if any is ordered, at any time prior to production.

Dated: 12/11/02

/s/
HOWARD R. LLOYD
UNITED STATES MAGISTRATE JUDGE

(6)

No. 02-572

Supreme Court, U.S.
FILED
DEC 23 2002
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATUTE

15 U.S.C. § 6203(a) 6

TREATISE

Robert L. Stern, Eugene Gressman et al., *Supreme Court Practice* (8th ed. 2002) 2, 9

INTRODUCTION

This case presents two distinct circuit conflicts on issues of such international significance that the European Commission itself has taken the extraordinary step of urging this Court to grant certiorari. Nothing in AMD's opposition provides a basis for denying that request and this petition.

As an initial matter, AMD seeks in vain to deny the existence of these two conflicts. AMD tries to explain away the multi-circuit conflict on the first question presented by reasoning that an intervening decision of the Third Circuit somehow frees appellate panels and district courts in the First and Eleventh Circuits to ignore their own circuit precedent. But that argument falters because the Third Circuit is not this Court, and its decision to oppose the First and Eleventh Circuits only deepens the existing conflict. AMD's effort to deny the other conflict, on the second question presented, illogically presupposes that a 1996 statutory amendment that cuts *against* the Ninth Circuit's position might induce the Second Circuit to *join* that position, even though the Second Circuit reaffirmed its own contrary position just last year.

AMD stands on no firmer ground when it claims that the EC asks the Court to grant certiorari only because it "misunderstand[s]" this case. Opp. 13. To the contrary, the EC understands this case perfectly. "It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions[.]" *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 542 (1987). By endorsing American-style discovery under section 1782 without regard to "admissibility in the foreign tribunal" (Pet. App. 8a), the decision below creates so much concern about the U.S. discovery consequences of informal interaction with foreign antitrust authorities that it discourages any well-counseled U.S. com-

pany from volunteering its cooperation with the EC. *See* Br. of EC as Amicus Curiae ("EC Br.") 6-8.[1]

Finally, there is no merit to AMD's claim that certiorari should be denied because the decision below is "interlocutory." This Court routinely grants certiorari, despite the formally interlocutory character of a case, "where the opinion of the court below has decided an important issue, otherwise worthy of review," and particularly where the case presents "a conflict on a question of law with another court of appeals." Robert L. Stern, Eugene Gressman et al., *Supreme Court Practice* 260 (8th ed. 2002). Nothing the district court could do on remand would sharpen the Court's understanding of the purely legal threshold issues presented here. Indeed, for a variety of reasons, this petition may give the Court its best opportunity for many years to resolve these long-standing disagreements about the threshold requirements of section 1782.

ARGUMENT

I. The Circuit Conflicts Implicated By The Decision Below Are Live, Entrenched, And Squarely Presented.

This case presents two circuit conflicts about core interpretive issues arising under section 1782. First, because the

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[1] *See* Br. Amicus Curiae of the Nat'l Ass'n of Manuf. 7 ("It is one thing for . . . American companies to be subject to the jurisdiction, laws and regulatory procedures of the foreign nations in which they do business. It is quite another to subject these companies to onerous American-style discovery sought by their direct competitors—both foreign and domestic—when that discovery is unauthorized by the foreign country whose laws the competitor invokes and when the competitor is not a party to any pending or even imminent adjudicatory proceeding in a foreign country."); Br. Amicus Curiae of the Chamber of Commerce of the U.S. 15 ("'[I]t is puzzling why the value judgments another country has made about the role of discovery are entitled to so little weight, since American discovery is, to say the least, both unique and not widely admired.'") (quoting Molly W. Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U.L. REV. 591, 619 (2001)).

very purpose of section 1782 is to facilitate international comity by "assist[ing] foreign and international tribunals," the First and Eleventh Circuits have held that private parties may obtain discovery under section 1782 only where they can "show that the information sought in the United States would be discoverable under foreign law." *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 2, 7 (1st Cir. 1992); *see* Pet. 8-10 (citing cases). The Second, Third, and Ninth Circuits reject any such requirement. *See id.* The Second and Ninth Circuits separately disagree on whether section 1782 discovery is limited to circumstances in which quasi-adjudicatory foreign proceedings are either pending or at least "imminent—very likely to occur and very soon to occur." *In re Application of Ishihara Chem. Co.*, 251 F.3d 120, 125 (2d Cir. 2001) (internal quotation marks omitted); *see* Pet. 13-14.

a. As an initial matter, AMD's brief in opposition confirms that this case squarely presents each of those conflicts. As to the first, AMD does not deny, and the decision below confirms (*see* Pet. App. 7a-8a), that AMD would be unable to obtain under EC law the very discovery that it seeks here. AMD thus acknowledges that this case presents an opportunity to resolve the conflict on the first question presented; the only question AMD raises is whether such a conflict is "intolerable" enough to warrant review. Opp. 28.[2]

As to the conflict on the second question ("imminence"), AMD does not deny that the first-stage investigation now underway is non-adjudicatory. It thus accepts the premise of the decision below (*see* Pet. App. 6a) that such an investiga-

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[2] AMD does argue that, because no documents have yet been produced, it is too early to tell whether the EC "would value the documents" that AMD seeks. Opp. 27-28. But that is irrelevant: the conflict on the first question presented relates to whether the foreign authority permits private parties to obtain the discovery, not whether it might itself be interested in seeing the documents. In any event, the EC confirms that it does not in fact "consider it necessary to request or even subsequently to review the documents" that AMD seeks here. EC Br. 4

tion cannot qualify as a "proceeding" that itself triggers section 1782 discovery rights. *E.g.*, Opp. 17 ("discovery is allowable under § 1782 during the investigative stage of a proceeding only if the investigation is connected to a likely adjudicative proceeding"). Although AMD appears to disagree with both Intel and the EC itself about the proper characterization of any *second*-stage EC investigation,[3] it does not deny that the current "*preliminary* investigation . . . is almost certain to remain open until the second half of 2003 *at the earliest*." Pet. 7 n.3 (emphasis added, internal quotation marks omitted). Thus, AMD does not dispute any of the facts that led the Ninth Circuit to accept, for purposes of its analysis, that no "proceedings" are "imminent" in the foreign jurisdiction. *See* Pet. App. 6a. There is thus no genuine dispute that discovery would have been foreclosed if this case had arisen in the Second Circuit.[4]

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[3] Although immaterial to this Court's certiorari decision, AMD's description of second-phase EC investigations (Opp. 5) is misleading. It is undisputed that the EC does not view such investigations as adversarial, that no rules of evidence apply, and that no provision is made for taking testimony under oath, for compelling testimony, or for conducting witness cross-examination. *See* Pet. 15-16. Indeed, the complainant has no right to any hearing unless the subject of the investigation asks for one. *See* 3 E.R. 501. And the "independent person" brought in to address procedural issues does not arbitrate substantive disputes (*see* 3 E.R. 501-02), despite AMD's unsupported claim to the contrary (Opp. 5 n.2). As the EC explains, it "*never* adjudicates disputes between parties," whether in a first-stage or a second-stage investigation; "[t]he parties to a complaint cannot be considered 'litigants' before a 'tribunal'"; and "a complainant ultimately is only a person reporting an alleged violation of the law to a public authority." EC Br. 4-5.

[4] AMD does suggest that the prospect of an eventual quasi-judicial proceeding here is no more speculative than the prospect of the foreign criminal proceeding at issue in *In re Erato*, 2 F.3d 11 (2d Cir. 1993), in which discovery was permitted. But the Second Circuit had no occasion in that case to apply the imminence requirement, because the foreign government sought the discovery under the terms of a treaty that "supersede[d]" section 1782, such that "existing law under section 1782 d[id]

b. AMD nonetheless claims that, even though this case may present them, these acknowledged circuit conflicts are not "intolerable" enough (Opp. 23, 28) to warrant this Court's review. As to each conflict, that claim is wrong.

First, as the Ninth Circuit recognized, *see* Pet. App. 7a-8a; *see also Four Pillars Enters. Co.* v. *Avery Dennison Corp.*, 308 F.3d 1075 (9th Cir. 2002), circuit precedent in the First and Eleventh Circuits would preclude private party discovery of these materials for the simple reason that the foreign authority on whose behalf AMD ostensibly seeks them does not even authorize such discovery. Those courts adopted that position because they independently determined that it best effectuates the statutory purpose—not, as AMD contends, because they were somehow bound to follow the Third Circuit's reasoning in *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132 (3d Cir. 1985). For example, the First Circuit, which cited *John Deere* only in passing, surveyed the "history, rationale, and the policy considerations" of section 1782 before concluding that a section 1782 applicant must "make a showing that the information is discoverable under foreign law." *In re Application of Asta Medica S.A.*, 981 F.2d 1, 6-7 (1st Cir. 1992). Because the Third Circuit is not this Court, its subsequent decision to join the other side of this entrenched multi-circuit conflict, *see In re Bayer AG*, 146 F.3d 188 (3d Cir. 1998), does not somehow negate binding circuit precedent in the First and Eleventh Circuits.[5]

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not control this case." *Id.* at 15. AMD's suggestion that the Second Circuit has thereby "understood its requirement as *allowing* discovery during an investigative stage" (Opp. 2) is thus false.

[5] AMD claims that the passage addressing this issue in *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151 (11th Cir. 1988), is "dictum." Opp. 29. That is both mistaken and irrelevant. First, the *Trinidad* court's treatment of this issue is precedential, because it adopted the discoverability requirement as circuit law and applied it to the facts of the case. *See* 848 F.2d at 1156. Even if that were not so, the Eleventh Circuit's subsequent reaffirmation

AMD fares no better in arguing that a 1996 amendment to section 1782 draws into question the conflict between the Second and Ninth Circuits on the second question presented ("imminence"). By adding the final clause to the first sentence of section 1782(a), the 1996 amendment authorized the district courts to include "criminal investigations conducted before formal accusation" within the scope of the foreign matters that can trigger discovery rights under section 1782. To the extent that amendment is relevant at all to the second question presented, it cuts in favor of the Second Circuit's position and against the Ninth's. The new clause added by the 1996 amendment would be surplusage if, as AMD argues, courts already had plenary authority before 1996 to order section 1782 discovery in the absence of a pending or imminent foreign proceeding. Because Congress is presumed not to have wasted its breath, the addition of this new clause, confined to *criminal* investigations, confirms that no such discovery is appropriate in the *civil* context.[6] In all

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of the same position in *In re Lo Ka Chun*, 858 F.2d 1564, 1566 (11th Cir. 1988), plainly was necessary to the court's holding in that case (*see* Opp. 29 n.16), and it thus *independently* serves as circuit precedent. *See also United Kingdom* v. *United States*, 238 F.3d 1312, 1319 (11th Cir.), *cert. denied sub nom. Raji* v. *United States*, 122 S. Ct. 206 (2001).

[6] AMD is likewise wrong on the merits to dismiss the Eleventh Circuit's view that "a private individual may need to be a litigant in a *pending* proceeding in order to be an 'interested person'" entitled to section 1782 discovery. *Trinidad*, 848 F.2d at 1155-56 (emphasis added); *see* Opp. 15. AMD's own merits position not only drains the 1996 amendment of significance, but conflicts with Congress's decision, in a parallel provision, to authorize *pre-litigation* discovery in aid of foreign antitrust investigations *only* "[o]n the application of the Attorney General." 15 U.S.C. § 6203(a); *see* Pet. 13. AMD's position also focuses artificially on the deletion of one word ("pending") amid a broader rephrasing of section 1782 in 1964. The "contemporaneous record" (Opp. 21) that AMD cites in attaching substantive significance to that deletion is not legislative history, but a law review article (*see* Opp. 7-8). Finally, the Eleventh Circuit's distinction between private civil litigants and foreign

events, nothing in the 1996 amendment could prompt the Second Circuit to *renounce* its position and join ranks with the Ninth. In fact, since 1996, the Second Circuit has repeatedly reaffirmed the vitality of its "imminence" requirement. *E.g., Ishihara*, 251 F.3d at 125, 127 n.4; *see United States* v. *Sealed 1*, 235 F.3d 1200, 1205 n.2 (9th Cir. 2000).

Each of these circuit conflicts will persist until this Court intervenes. Ordinarily, one such conflict would suffice for certiorari; this case presents two. Moreover, unlike the typical circuit conflict, which involves issues of purely domestic significance, each of these conflicts projects a chaotic picture of U.S. law not just to American litigants, but to the foreign governments whose regulatory interests are often at stake.

II. The European Commission's Concerns About The Decision Below Are Compelling.

It is rare for any foreign governmental authority to appear as an amicus to urge this Court to grant a petition for certiorari. That the EC would do so here, representing many of this Nation's closest strategic and trading partners, speaks volumes about the international significance of the questions presented. As the EC observes, the Ninth Circuit's decision "fundamentally misconstrues the nature of the European Commission," which "functions primarily as a law enforcement agency in the antitrust field" and "does *not* adjudicate the rights of parties, as a tribunal would do"; it "may undermine" cooperation in the EC's Leniency Program; and it "risks interfering with the normal conduct of international cooperation between the Commission services and United States antitrust authorities." EC Br. 3-5.

AMD contends that the EC's concern about the threat to the Leniency Program "follows from a simple misunderstanding of this case and the decision below." Opp. 13. Any

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criminal authorities is sensible: pre-litigation discovery is the norm in the criminal context, but is virtually non-existent in the civil context.

misunderstanding, however, is AMD's. The decisions of companies to participate in the Leniency Program—under which they "submit information regarding existing cartels of which they have knowledge in exchange for leniency from the Commission with respect to their own wrongdoing" (EC Br. 6)—are often difficult and close. The Ninth Circuit's decision will undeniably affect the antitrust advice that multinational companies receive about the benefits and risks of participating in that program. Whether or not the scope of *AMD's* discovery request includes Leniency Program documents (*see* Opp. 13), the Ninth Circuit's embrace of "liberal discovery" under section 1782 (Pet. App. 8a), and its rejection of any limitation "regarding admissibility in the foreign tribunal" (*id.*), will be cited by the likes of AMD to permit discovery in this country of any competitor's submissions to the EC. Revealingly, AMD does not claim otherwise.

Moreover, to companies contemplating the near-term consequences of participation in the Leniency Program, it will come as small comfort that this Court might eventually exercise its discretionary certiorari jurisdiction to "review . . . at the appropriate time" a "fail[ure] to protect Leniency Program confidentiality." Opp. 14. The EC's support for certiorari now, rather than five or ten years from now, reflects its valid concern that the decision below will immediately erode the private incentives needed to sustain key components of the EC's competition regime.[7]

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[7] AMD claims that it "takes the EC's position in this case very seriously, and would not be proceeding if the EC expressed any objection to the procedure AMD has invoked to obtain evidence to support its case against Intel[.]" Opp. 13. This claim is perplexing, given that the EC has filed an amicus brief in this Court making precisely such an "objection." AMD's disregard for the concerns of the foreign authority on whose behalf it is ostensibly seeking this discovery makes sense only if AMD has as much of an interest in procuring that discovery for its own sake as in persuading the EC to take action on its complaint. Also, despite AMD's contrary suggestion (Opp. 10), Intel filed a conditional cross-application

III. The Interlocutory Nature Of The Decision Below Presents No Obstacle To This Court's Review.

There is also no merit to AMD's argument that certiorari is somehow inappropriate because the decision below is "interlocutory." This Court commonly exercises its certiorari jurisdiction to review interlocutory decisions in federal non-criminal cases "where the opinion of the court below has decided an important issue, otherwise worthy of review"—particularly where, as here, the case presents "a conflict on a question of law with another court of appeals."[8]

The real question is whether the procedural posture of a case would somehow impair this Court's review of the legal questions presented. Here the answer is no. This case presents two pure disputes of statutory interpretation whose resolution depends not on the particulars of the documents, but on the text, purposes, and history of section 1782. AMD spends several pages purporting to argue otherwise (Opp. 10-14), but produces nothing beyond nebulous generalities about the virtues of awaiting more facts and "further percolation" (Opp. 3). At bottom, this argument against certiorari makes no more sense than the untenable position that this Court should deny review of all "interlocutory" court of appeals decisions resolving threshold questions (such as jurisdiction) before remanding for further proceedings on the merits.

Moreover, there is good reason to grant certiorari now rather than at some indefinite point in the future. The precedential consequences of the Ninth Circuit's decision affect not just these particular parties, but all U.S. companies that

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for section 1782 discovery not because it is hypocritical, but because it wishes to preserve its rights in the event that AMD's position ultimately prevails, and Intel so emphasized in its *conditional* pleading.

[8] Robert L. Stern, Eugene Gressman et al., *Supreme Court Practice* 260 (8th ed. 2002) (citing, *inter alia*, *Central Bank* v. *First Interstate Bank*, 511 U.S. 164 (1994); *Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462 (1977); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945)).

do business in the EC, as the EC itself emphasizes in its brief. Nothing that the district court could do on remand would alleviate these larger concerns about the impact of the Ninth Circuit's decision on the way that private companies deal with the EC and other foreign authorities.

Finally, the decision below may present the optimal procedural vehicle for this Court's review of the questions presented here precisely *because of* its interlocutory character. If this petition is granted in the normal course, the Court could resolve each of those questions on the merits this Term, before there could be any material change in the status of the current EC investigation. *See* p. 4, *supra*. If, on the other hand, this Court were to defer review indefinitely, until the conclusion of remand proceedings in the district court and court of appeals, there is no guarantee that the case would ever reach the Court again. *Cf. Church of Scientology* v. *United States*, 506 U.S. 9 (1992) (compliance with documentary summons enforcement order did not moot appeal). Moreover, there is no reason to believe that any similar case that eventually reaches this Court in the form of a "final order" will present, as cleanly as this case does, two different circuit conflicts on the core meaning of section 1782. Deferring this Court's review into the indefinite future might well suit AMD's interests, but it would disserve the larger public interest in creating a coherent body of U.S. law on these internationally significant issues.[9]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[9] As AMD notes, the district court has scheduled an initial hearing for January 10 to address the specifics of AMD's document requests. The court has ordered AMD to amend its existing section 1782 application to make it less "overbroad" (Opp. App. 5a-6a), much as a party might need to amend its complaint in an ordinary civil suit. AMD does not and could not argue that this procedural order presents any threshold obstacle to this Court's review of the underlying legal issues.

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No. 02-572

IN THE

Supreme Court of the United States

INTEL CORPORATION,
Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONER

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Petitioner Intel Corporation respectfully submits this supplemental brief in response to the brief filed by the Solicitor General on October 6, 2003. *See* Sup. Ct. Rule 15.8.

DISCUSSION

1. The Solicitor General's brief appropriately puts to rest any doubt that certiorari should be granted in this case. Sovereigns on both sides of the Atlantic have now urged the Court to review the recurring issues presented here, and few cases will ever present a better vehicle for resolving those issues. *See* Intel Reply Br. 9-10.[1] Also, as discussed in our petition and reply brief, this case presents not one, but two, circuit conflicts on issues of recurring international significance. Although we disagree (*see* Intel Reply Br. 6-7) with the government's hesitation to find a square circuit conflict on the second question presented in the petition, we quite agree that, no matter how firm the Court perceives that conflict to be, the Court should grant certiorari on all questions presented "to clarify the proper application of the statute." U.S. Br. 1.

2. a. There is more agreement than disagreement between Intel and the federal government on the merits. Like Intel, the government agrees that granting AMD the discovery it seeks would be anomalous at best, given that (i) AMD is not a litigant in any foreign "proceeding," (ii) AMD has no right to such discovery under the laws of the sovereign it ostensibly hopes to benefit (the European Commission), and (iii) that sovereign has made clear that it does not want such discovery in any event. *See* U.S. Br. 18-20 & n.7. And the government comes very close to outright support for Intel's position that discovery under these circumstances

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[1] The European Commission's investigation remains in the same preliminary phase in which it was previously, and the EC has taken none of the procedural steps that must precede the closing of such an investigation. Similarly, the remand proceedings in the district court (*see* Pet. 7 n.3) have been held in abeyance pending this Court's disposition of the petition.

should be denied. *See* U.S. Br. 18 (the relevant factors in this case "weigh against granting the requested discovery").

The principal disagreement between Intel and the government concerns how the federal courts should reach that conclusion. The two circuit conflicts discussed in our petition involve recurring fact patterns, and thus recurring legal questions, in the application of section 1782. The government would commit the resolution of such questions to the ultimate discretion of scores of district courts, each of which would be free to disagree with the others on the proper scope of discovery under section 1782. In contrast, Intel's position, like that of the First, Second, and Eleventh Circuits, would ensure greater predictability and national consistency in this internationally sensitive area by prescribing generally applicable rules of practice to resolve such cases.

The latter course is both preferable and appropriate as a matter of sound legal practice. Appellate courts, including this Court, often exercise their inherent supervisory authority to adopt rules of practice for the lower federal courts to follow in deciding procedural issues, such as the discovery issues presented here:

> It cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. Indeed, this Court has acknowledged the power of the courts of appeals to mandate "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution."

Thomas v. *Arn*, 474 U.S. 140, 146-47 (1985) (citation omitted) (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). In the habeas corpus context, for example, this Court has rejected lower court procedural decisions that "did not contravene the letter" of the governing federal statute, reasoning that the Court can and should impose procedural rules for "channeling the discretion of federal habeas courts" "[i]n light of the profound societal costs that attend the exercise of ha-

beas jurisdiction."[2] Here, the Court should exercise similar authority to make clear that the Ninth Circuit's accommodation of "liberal discovery" in this area (Pet. App. 8a) defeats the very comity objectives underlying section 1782—as the EC observes in its nearly unprecedented amicus brief.

b. Quite apart from these considerations, the text and legislative history of section 1782 fully support the limiting constructions adopted by the First, Second, and Eleventh Circuits. We have discussed those issues in our petition and reply brief and will not repeat that discussion here. Nonetheless, the government makes several points that warrant a brief response.

First, the government argues that Congress's use of the phrase "any interested person" rather than "litigant" in the body of section 1782, together with the legislative history of that word choice, suggests that the class of *private persons* entitled to discovery under section 1782 must extend beyond genuine litigants. As noted, the government would then rely on the discretion of individual district courts to deny such discovery to virtually all private non-litigants. But it would be more appropriate and straightforward to read the statute to exclude private non-litigants in the first place. As the Conference Report accompanying the 1964 revisions confirms, Congress used the phrase "any interested person" simply because the category of persons entitled to invoke the statute extends beyond litigants to encompass various types of *officials* who might act on behalf of a foreign sover-

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[2] *Calderon* v. *Thompson*, 523 U.S. 538, 554, 559 (1998) (internal quotation marks and citations omitted); *see also McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991) (similar approach in adopting "cause and prejudice" standard); *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978) (per curiam) (adopting non-textually-based rule of practice for Fed. R. Civ. P. 58); *Jencks* v. *United States*, 353 U.S. 657 (1957) (adopting non-constitutional, non-statutory rule of practice for criminal discovery in federal cases); *see generally Dickerson* v. *United States*, 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.").

eign: "A request for judicial assistance under the proposed revision may . . . be made in a direct application by an interested person, such as a person designated by or under a foreign law, or a party to the foreign or international litigation." S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3789; *see also In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1154-55 (11th Cir. 1988).

Nothing in the Report evinces any intent to make discovery under section 1782 available to persons other than litigants, foreign sovereigns, and the designated agents of those sovereigns. Indeed, the Report consistently describes the class of potential section 1782 applicants as foreign tribunals (or officials) and private "litigants before such tribunals." 1964 U.S.C.C.A.N. at 3788.[3] And, of course, the very title of section 1782 makes clear that the statute was enacted to render "[a]ssistance to foreign and international tribunals and to *litigants* before such tribunals." 28 U.S.C. § 1782 (emphasis added); *see also Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) ("'the title of a statute . . . [is

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[3] *Accord* 1964 U.S.C.C.A.N. at 3782-83 (section 1782 designed to "provid[e] equitable and efficacious procedures for the benefit of tribunals and *litigants* involved in *litigation* with international aspects"); *id.* at 3788 (section 1782 "clarifies and liberalizes existing U.S. procedures for assisting foreign and international tribunals and *litigants*"); *id.* at 3789 (application may be filed "by an interested person, such as a person designated by or under a foreign law, or a *party* to the foreign or international *litigation*"); *id.* ("proposed revised subsection (a) permits effective and desirable assistance to foreign and international courts and *litigants* before such courts"); *id.* at 3792 (transmittal letter from the Commission on International Rules of Judicial Procedure) (proposed bill is designed "to improve judicial procedures for serving documents, obtaining evidence, and proving documents in *litigation* with international aspects"); *id.* at 3793 (enactment would "provid[e] equitable and efficacious procedures for the benefit of tribunals and *litigants* involved in *litigation* with international aspects"); *id.* at 3794 (letter from President Kennedy to Congress) ("we have reached the conclusion that the procedural reforms which [the legislation's] enactment would accomplish would be most desirable from the standpoint of the administration of international justice on behalf of private *litigants*") (all emphases added).

a] tool[] available for the resolution of a doubt' about the meaning of a statute" (quoting *Trainmen* v. *Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947))).

Viewed in this light, the 1996 amendment—which Congress added to ensure the availability of discovery to aid foreign "criminal investigations conducted before formal accusation"—cuts squarely for, rather than against, an appropriately limited scope for private party discovery under section 1782.[4] This amendment reveals Congress's intent to preserve pre-litigation discovery in the one context in which it is customary, both here and abroad: in *criminal* investigations, conducted by foreign sovereigns or their agents.[5] By explicitly confining that clause to the criminal setting, Congress indicated that it did not wish to extend pre-litigation discovery to the civil context. That is understandable, because, outside of the narrow circumstances described in Fed. R. Civ. P. 27(a), prelitigation civil discovery is almost unheard of, both in the United States and in foreign jurisdictions.

Like AMD, the government also attributes significance to Congress's deletion in 1964 of the word "pending" from the identification of the foreign "proceedings" for which discovery could be taken. But, if this deletion has significance at all, it shows at most that Congress did not mean to condition discovery on the pendency of a proceeding in *all* con-

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[4] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 186, 486 (1996).

[5] *In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d 308, 310-11 (5th Cir. 1995) (whereas "courts in the United States have routinely undertaken a discoverability determination when the request for information comes from a private litigant" so as "to avoid assisting a foreign litigant who desires to circumvent the forum nation's discovery rules," that comity rationale "is, by necessity, not present in the case where a foreign court is making a request for information, because the foreign court is, presumably, the arbiter of what is discoverable under its procedural rules"); *accord In re Letter of Request from the Amtsgericht Ingolstadt, Federal Republic of Germany*, 82 F.3d 590, 592 (4th Cir. 1996).

texts. As the 1996 amendment later demonstrated, Congress did want to preserve pre-litigation discovery in the criminal context, where it is commonplace. Again, however, it does not follow that Congress wished to create a new species of otherwise ubiquitously unavailable pre-litigation *civil* discovery. In any event, it is doubtful that the deletion of this one word, amid a much broader rephrasing of section 1782 in 1964,[6] carries any real significance at all. As the Second Circuit has observed:

> [T]he legislative history makes no mention of this change and describes the broadening of proceedings in language that raises a question as to whether the deletion of 'pending' was intentional or inadvertent: "The word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are *pending* before investigating magistrates in foreign countries."

In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil, 936 F.2d 702, 705 (2d Cir. 1991) (quoting H.R. Rep. No. 88-1052, at 9 (1963)) (emphasis added by court). Although the Second Circuit ultimately concluded that an "imminence" requirement would better suit the underlying statutory purposes than a requirement that proceedings be "pending," it did so not because it thought the legislative history compelled that result,

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[6] The pre-1964 version of the statute read:

> The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found. The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.

Act of June 25, 1948, 62 Stat. 869, 949 (paragraph break omitted).

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but because it believed such an approach "does no violence to any articulated congressional objective." *Id.* at 706.

CONCLUSION

The petition for a writ of certiorari should be granted.

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No. 02-572

IN THE
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INTEL CORPORATION,
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v.

ADVANCED MICRO DEVICES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

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RESPONDENT'S SUPPLEMENTAL BRIEF IN SUPPORT OF CERTIORARI

On January 13, 2003, this Court invited the Solicitor General to file a brief in this case expressing the views of the United States. The Solicitor General's response argues (1) that the court of appeals correctly resolved each of the three Questions Presented in the petition, (2) that this Court nevertheless should grant certiorari to settle and clarify the law on each point, and (3) that the specific characteristics of this case weigh against granting the particular discovery requested here.

1. Respondent Advanced Micro Devices ("AMD") of course agrees with the United States that the decision below was correct and that AMD should prevail on the merits with respect to the questions raised in the petition.

2. Given the position of the United States, AMD also withdraws its opposition to certiorari. AMD believes a grant of certiorari would mitigate the risk that the underlying matter might become moot through delay. *Accord* Intel Reply Br. 10. AMD's application for discovery has now been pending for more than two years. The European Commission ("Commission") investigation to which that application relates has been pending for three years. As AMD has explained, the application is designed to obtain information for AMD to submit to the Commission for use either in a proceeding on a Statement of Objections against Intel or in a proceeding by AMD against the Commission in the European Community courts for failure to act against Intel. AMD Opp. 4-5, 18 n.8, 20 n.9. The United States correctly notes, however, that if AMD does not obtain the information before the Commission closes the investigative stage of the proceeding, neither AMD nor the Community courts will be able to rely on it in subsequent proceedings. SG Br. 19 & n.7. It is in AMD's interest to obtain an expeditious resolution of this § 1782 dispute so that any information obtained may be timely submitted to the EC.

While AMD previously urged this Court to deny review in this case at least until there is a final discovery order, the views expressed by the Solicitor General favoring certiorari increase the likelihood that this Court will grant review at one point or another. AMD believes that if issues raised by Intel are to be resolved by this Court, they should be resolved sooner, rather than later.

3. AMD strongly disagrees, however, with the Solicitor General's suggestion that although the district court has the *discretion* to issue the discovery requested in this case, "the particular characteristics of the request in this case weigh against granting the requested discovery as a matter of discretion." SG Br. 18. The "characteristics" identified by the Solicitor General are that the current proceeding is an investigation, *id.*, and that "the Commission's amicus brief suggests that the Commission, which is capable itself of invoking Section 1782, does not need or want the district court's assistance" in that investigation, *id.* at 19. This view is premised on a misunderstanding both of the Commission's position in this case and of the purpose of AMD's discovery request.

a. As an initial matter, the Commission's brief does not necessarily demonstrate that the Commission "does not need or want" the information AMD seeks to discover. It would be unlikely for the Commission to take such a position, given that its regulatory mandate *requires* it to consider any evidence submitted by a complainant. *See infra* at 3. In fact, the Commission's brief makes clear that its purpose here is institutional, relating solely to its "interest in ensuring the continued proper functioning of its antitrust enforcement program," EC Br. 3, and specifically its Leniency Program, *id.* at 6-7. The Commission explicitly states that "the filing of this *amicus* brief in no way reflects support by the European Commission of the merits of the underlying claims made by either party to this proceeding." EC Br. 3. The Commission's brief does confirm that the Commission itself

has not sought the requested documents, but that fact only sets up the question here, it does not answer it.

b. If the Commission's brief *did* evince a precommitment not to examine any evidence produced in response to AMD's discovery request, as the Solicitor General apparently believes it does, that would only militate *in favor* of granting the request. The Solicitor General's suggestion to the contrary misapprehends the way the requested discovery would be used in the European proceedings.

The rights and procedures of the Commission and of European Community courts are in many ways quite different from ours. As the Solicitor General acknowledges, a complainant has the legal right to submit evidence to the Commission in support of its complaint. SG Br. 18. This right is vital, because the Commission, like most enforcement agencies, has limited resources. Thus, its interest in pursuing certain investigative avenues may easily be, and often is, a matter of resource limitations or administrative priorities. This is why European practice does not leave a complainant subject to the vagaries of the Commission's interest in information, but, instead, imposes on the Commission the *legal obligation* to examine and consider any evidence submitted by a complainant:

> [A]lthough the Commission cannot be compelled to conduct an investigation, the procedural safeguards provided for by Article 3 of Regulation 17 and Article 6 of Regulation 99/63 [now Regulation 2842/98] oblige it nevertheless to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such kind as to distort competition in the Common Market and affect trade between the member-States . . . .

Case T-24/90, *Automec Srl v. Commission*, 1992 E.C.R. II-2223, 5 C.M.L.R. 431, 478 (1992). Further, if the Commis-

sion preliminarily decides not to proceed, it must provide the complainant an "Article Six letter" and allow the complainant to respond. *Id.* at 476-77. "The purpose of that intermediate phase in the administrative procedure before the Commission is, in fact, to safeguard the rights of the complainant, to whom an unfavourable decision should not be addressed without first giving him the opportunity to submit observations on the grounds upon which the Commission intends to rely." Case C-282/95P, *Guerin Automobiles v. Commission*, 1997 E.C.R. I-1503, 5 C.M.L.R. 447, 481 (1997).

Once that intermediate stage is complete, the Commission *must* either reject the complaint or initiate an action against the subject of the complaint. *Id.* If it initiates an action, "the complainant is entitled to participate." *Id.* If the Commission rejects the complaint, that decision may be "the subject-matter of an action [by the complainant] for annulment before the Community courts." *Id.* In that action, the Community courts will rely on evidence submitted by the complainant during the investigative stage to determine "first, whether the Commission has carried out the examination of the complaint which it is required to do by evaluating with all the requisite care the factual and legal aspects adduced by the applicant in his complaint." *Automec Srl*, 5 C.M.L.R. at 478.

Accordingly, no matter what the Commission in this case ultimately decides, the evidence AMD seeks to submit *will* be "use[d]" in a "proceeding" before a "foreign tribunal."

The Solicitor General does not contend otherwise, *see* SG Br. 19 (agreeing that discovery obtained from Intel by AMD would be used by AMD in proceeding before foreign tribunal the meaning of § 1782), but nevertheless suggests that the district court should consider, as "weigh[ing] against" discovery here, the supposed fact (*but see supra* at 2) that the Commission "does not need or want the district court's assistance." SG Br. 19. This is quite wrong.

First, since neither the court nor the Commission can possibly know what the Commission might actually "need" without having the information to evaluate, this factor cannot seriously weigh against disclosure of the information. Second, what the Commission might "want" is simply beside the point. As noted above, the Commission is *required* by European Community law to consider any evidence submitted by the complainant during the investigative stage, whether the Commission wants to look at it or not. Equally important, because the evidence is required to be a part of the Commission's analysis, if the Commission decides not to proceed, the complainant has the right to use the evidence in an action *against* the Commission contending that an action against Intel should have been taken. And European Community courts of review will rely on such evidence in determining whether the Commission acted properly in declining to proceed. There is no basis in European procedure for the Commission itself to curtail the courts' access to a complete record.

Indeed, if the Commission negatively prejudges the value or relevance of evidence a party seeks to submit, it is all the *more* imperative that the record be completed so that the Commission's decision can be adequately reviewed. As we have seen, one of the main reasons a complainant such as AMD is allowed to participate in Commission proceedings is to help create the factual record so that the courts can tell whether the Commission has fulfilled its duties. Thus if the Commission itself will not "use" the evidence it is even more certain that AMD and the European Community courts *will* use it, underscoring the importance of granting the discovery request. In short, any suggestion that the Commission does not want or need the evidence sought by AMD only weighs *in favor* of granting the request.[1]

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[1] This contrasts with the relevance of the Commission's views on, for example, the risks a given § 1782 discovery request might pose to the

CONCLUSION

For the foregoing reasons, the petition should be granted. This Court should affirm the judgment below with respect the legal issues presented in the petition and should reject the Solicitor General's suggestion that the particular characteristics of this case weigh against granting the discovery requested.

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Dated: October 21, 2003

Commission's Leniency Program. AMD agrees with the Solicitor General that the Commission's views as to the potentially harmful effects of a given discovery request on the Leniency Program would be relevant to a district court's exercise of discretion over the request. *Compare* AMD Opp. 13-14 *with* SG Br. 14. In this case, however, nobody disputes that AMD's request does *not* seek or implicate Leniency Program documents. AMD Opp. 13; Intel Reply Br. 8.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE COMMISSION OF THE EUROPEAN COMMUNITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

No. 02-572

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE COMMISSION OF THE EUROPEAN COMMUNITIES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST[1]

This brief is submitted on behalf of the Commission of the European Communities (the "European Commission" or the "Commission") as *amicus curiae* in support of the petition for writ of certiorari.

The European Commission is a unique institution under international law, covering subject areas ranging

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6. The brief is filed with the consent of the parties, and copies of the consent letters have been filed with the Clerk.

from antitrust ("competition law") to international trade and from foreign aid to environmental protection. The Treaty establishing the European Community (the "EC Treaty") sets up an institutional system in which the Council of the European Union represents the national governments, the European Parliament is directly elected by citizens and the Commission is entrusted with a general role as "Guardian of the Treaty."[2] This "institutional triangle" is flanked by two additional institutions, the Court of Justice and the Court of Auditors.[3]

The Commission has been granted direct enforcement powers, in particular in the field of EC competition law and policy. As part of its duties, the Commission, through its services (the Directorate-General for Competition), regularly investigates the compatibility of certain behavior or proposed activities with EC competition law. The activities of the Commission services include not only reviewing proposed mergers and policing alleged industrial cartels and monopolies, but also overseeing government financial aid and formulating policies designed to aid market liberalization.

As part of its enforcement activities, the Commission operates a Leniency Program,[4] under which leniency applicants are encouraged to submit information and evidence regarding the existence of cartels, as well as other details of their involvement.

Amicus is concerned that the Ninth Circuit's opinion may interfere with the normal conduct of the Commis-

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[2] EC Treaty, art. 189, 202, 211.

[3] *Id.* art. 220, 246. A Court of First Instance is attached to the Court of Justice to hear certain matters—including competition cases—subject to a right of appeal to the Court of Justice. *Id.* art. 225.

[4] Commission Notice On The Non-Imposition Or Reduction Of Fines In Cartel Cases, *Official Journal of the European Communities* ("*OJ*") C 207, at 4 (July 18, 1996), *as amended*, Commission Notice On Immunity from Fines And Reduction Of Fines In Cartel Cases, *OJ* C 45, at 3 (Feb. 19, 2002).

sion's law enforcement mission. First, the decision may undermine its Leniency Program by permitting United States courts to order discovery of leniency applications made to the Commission—thus deterring companies from coming forward in the first place with vital information. More fundamentally, the Ninth Circuit's decision is predicated on a misunderstanding of the unique role and status of the European Commission, which, while it may in some circumstances indeed function as a "tribunal," in other circumstances acts as a law enforcement agency, detecting and investigating alleged cartels and imposing fines on cartel participants. Finally, the opinion below arguably risks interfering with the normal conduct of international cooperation between the Commission services and United States antitrust authorities.

It should be noted that the filing of this *amicus* brief in no way reflects support by the European Commission of the merits of the underlying claims made by either party to this proceeding. Rather, it reflects the European Commission's overwhelming interest in ensuring the continued proper functioning of its antitrust enforcement proceedings, unhindered by the decision of the Ninth Circuit herein at issue.

SUMMARY OF ARGUMENT

The purpose of this brief is not to expand on the legal arguments presented by the petitioner. Rather, amicus seeks to assist this Court in understanding the nature of the European Commission and the impact the Ninth Circuit's decision may have on its law enforcement mission. The Ninth Circuit based its decision below on the notion that the Commission is a "tribunal" under 28 U.S.C. § 1782. The Commission has significant law enforcement functions, however, and the court's holding that it is a "tribunal" for purposes of ordering discovery may have adverse collateral consequences for the Commission's law enforcement efforts.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION FUNDAMENTALLY MISCONSTRUES THE NATURE OF THE EUROPEAN COMMISSION.

The Ninth Circuit held that the Commission's investigation of the complaint lodged against Intel "qualifies as a 'proceeding before a tribunal' within the meaning of 28 U.S.C. § 1782." Pet. App. 7a. As a result, anyone who submits a complaint to the Commission may potentially invoke the broad discovery procedures of the United States to obtain documents and other forms of discovery "for use in" the Commission "proceeding" instituted pursuant to that complaint. 28 U.S.C. § 1782. The Ninth Circuit also held that "there is no requirement that AMD show that what is sought would be discoverable in the proceedings before the European Commission." Pet. App. 9a. Thus, United States discovery procedures would become available to persons filing complaints with the Commission, even when the Commission *itself*, exercising its discretion, does not consider it necessary to request or even subsequently to review the documents sought—as was the case here.

The Ninth Circuit's holding fundamentally misconstrues the nature of the European Commission. The Commission functions primarily as a law enforcement agency in the antitrust field. Investigation and adjudication are far more distinct under United States law than they are in the European Community, where the Commission has significant responsibilities that may partake of an adjudicatory character, and also significant law enforcement duties as well.

While the Commission's status may not fit perfectly within concepts of United States law, it is clearly vested under EC law with a law enforcement mission in many areas. Tribunals decide the merits of one party's claim against another. The Commission, in contrast, *never* adjudicates disputes between parties; it is empowered (among other things) to receive a complaint by one

party, to conduct an investigation into that party's allegation of wrongdoing, and to fine the wrongdoer if it is violating EC competition law. Thus, a principal function of the Commission is to conduct investigations, sometimes based on information or documents submitted to it in confidence. While the Commission may in this context investigate complaints, it does *not* adjudicate the rights of parties, as a tribunal would do. The parties to a complaint cannot be considered "litigants" before a "tribunal."[5] Although enjoying certain rights attached to such status, a complainant ultimately is only a person reporting an alleged violation of the law to a public authority.

Indeed, the Commission often finds itself investigating matters in conjunction with United States authorities. Like those of the United States Department of Justice (DOJ) and the Federal Trade Commission (FTC), the European Commission's inquiries often require investigation of international anti-competitive behavior. As such, the Commission has a formal cooperation agreement with the DOJ and the FTC to share information and conduct parallel investigations, and those entities have engaged in numerous coordinated investigations of international cartels. *See* Agreement Between The Government Of The United States Of America and The Commission Of The European Communities Regarding The Application Of Their Competition Laws, *Official Journal of the European Communities*, No. L 95, 47 (April 27, 1995). The 1995 EC-United States Agreement puts the Commission and the DOJ or FTC on equal footing as enforcement bodies, defining each as "competition authorities."

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[5] The Court of First Instance exercises judicial review of Commission decisions in the field of EC competition law, subject to a right of appeal to the Court of Justice on points of law.

II. THE NINTH CIRCUIT'S DECISION MAY UNDERMINE THE COMMISSION'S LAW ENFORCEMENT MISSION.

The Commission has the responsibility to ensure the enforcement of EC competition rules. For that purpose, the Commission has been granted specific investigatory powers. One of the critical functions of any law enforcement agency is to receive information from persons or companies about potentially unlawful conduct that it may investigate.

To that end, the Commission developed its Leniency Program, under which companies are encouraged to submit information regarding existing cartels of which they have knowledge in exchange for leniency from the Commission with respect to their own wrongdoing. The information companies submit is typically in the form of "Corporate Statements"—evaluative documents written exclusively for the purposes of a leniency application to the Commission, expressing a company's own description of the cartel's action and practices deriving from its own participation in the cartel. The Leniency Program has been highly successful and constitutes an important enforcement tool of the Commission.

The success of the Commission's Leniency Program depends critically on the Commission's ability to assure leniency applicants that their self-evaluative submissions remain confidential. If the Ninth Circuit's holding regarding discovery in the United States extends to leniency documents, it could have a chilling effect on the willingness of leniency applicants to come forward to the Commission. It is of paramount importance that the Commission be in a position to assure confidentiality, as law enforcement agencies all around the world must often do, and that submissions to it not become discoverable on the mistaken premise that it is primarily or exclusively a "tribunal."

The finding of the Ninth Circuit could be used in an effort to undermine the Commission's current and future

efforts before United States courts to protect the confidentiality of leniency submissions presented to the Commission. Those submissions should benefit from the same protection granted to other law enforcement agencies under the "law enforcement investigatory privilege." The Ninth Circuit's conclusion that the Commission is a "tribunal" may significantly hamper the Commission's ability to invoke that protection as the law enforcement agency it is in the antitrust area, and may expose confidential statements to full discovery processes—thereby severely undercutting the effectiveness of the Leniency Program.

This is a very serious matter. If the United States court's conclusion undermines the effectiveness of the Commission's proceedings, for example through chilling its Leniency Program and complicating the Commission's ability to assert the law enforcement privilege, this would be a breach of the principle of international comity. The Commission has already intervened in United States civil proceedings to make clear that written leniency statements made to Directorate-General for Competition should not be discoverable to civil plaintiffs. In such cases, the Commission has argued that the production of written leniency statements is a key feature of the procedure that the Commission has put in place, as a law enforcement agency, to detect and prosecute cartels and other anti-competitive practices. The Commission's ability to enforce EC competition law could be critically undermined by the discoverability of the leniency statements it has been given by leniency applicants. If United States courts were to routinely order the production of such documents, it would undermine the effectiveness of the Commission's law enforcement efforts—a breach of the principle of international comity.

The Ninth Circuit's decision may also undermine the purpose of the United States–EC Antitrust Agreement, which places the DOJ, the FTC, and the Commission on equal footing as "competition authorities" in order to

promote cooperation and coordination of their actions in the antitrust field. The European Community's effective Leniency Program assists United States authorities' efforts to prosecute international cartels, because participation in the Commission's Leniency Program may influence whether companies come forward under similar programs in the United States.

CONCLUSION

For the foregoing reasons, the European Commission respectfully urges that the petition for certiorari be granted.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The National Association of Manufacturers (NAM) — eighteen million people who make things — is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

NAM members have an important interest in the correct interpretation and enforcement of 28 U.S.C. § 1782. Many NAM members do business in foreign countries, and are thus subject to the kind of official investigations that gave rise to the discovery dispute addressed by the Ninth Circuit in this case. By vastly expanding the scope of allowable discovery in this country pursuant to § 1782, the Ninth Circuit's ruling threatens a significant increase in the already substantial burdens and costs American corporations face as a result of judicial discovery. The Ninth Circuit's ruling also poses the particular danger of allowing companies that do business overseas to obtain sensitive, and competitively damaging, information from their business rivals by the simple expedient of petitioning foreign enforcement authorities to commence an investigation — even where the foreign authority would not itself authorize discovery and where the company seeking the discovery is not a party to any foreign judicial proceeding.

The NAM seeks review because it believes that the Ninth Circuit's egregiously expansive reading of § 1728 should be reversed, and that the provision should be interpreted in a manner that comports with the intent of Congress and with common sense. At a minimum, however, achieving a clear and uniform national rule concerning the scope of allowable discovery under § 1782 is important to

NAM members and to other businesses that are, or are contemplating, doing business in foreign countries. Such companies need to be able to factor the costs and risks of such discovery (especially the risk of disclosure of valuable competitive information) into their assessments of the wisdom of entering new markets.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

As the petition for certiorari filed in this case demonstrates, the Ninth Circuit's interpretation of 28 U.S.C. § 1782 raises two significant issues on which the Circuits are in direct conflict.

The first conflict involves the question whether a private entity may obtain discovery in this country pursuant to § 1782 when the same discovery is not authorized in the alleged foreign "proceeding" on which the entity relies to invoke § 1782 in the first place. The Ninth Circuit has held in this case that discovery under § 1782 is available in those circumstances. Pet. App. 8a. The Second and Third Circuits have similar rules. *Euromepa, S.A. v. R. Esmerian, Inc.*, 154 F.3d 24, 28 (2d Cir. 1998); *In re Bayer, AG*, 146 F.3d 188, 193 (3d Cir. 1998). The First, Fifth and Eleventh Circuits hold that discovery under § 1782 is not available in those circumstances. *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 7 (1st Cir. 1992) ("a litigant requesting assistance

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[1]Pursuant to Rule 37.2 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent are on file with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, the NAM states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

under Section 1782 has to show that the information sought in the United States would be discoverable under foreign law"); *In re Letter Rogatory From First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d 308, 310 (5th Cir. 1995) (same when private party makes request); *In re Request for Assistance From Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) (same).

The second conflict involves the question whether an adjudicative proceeding must be pending, or at least imminent, in a foreign tribunal before discovery under § 1782 is permitted in this country. In this case, the Ninth Circuit refused to impose such a limitation. Pet. App. 6a. The Second Circuit, in contrast, requires that a foreign adjudicatory proceeding be imminent before granting § 1782 discovery. *In re Application of Ishihara Chem. Co.*, 251 F.3d 120 (2d Cir. 2001); *In re Lancaster Factoring Co.*, 90 F.3d 38, 42 (2d Cir. 1996); *In re Request for Int'l Judicial Assistance (Letter Rogatory) for Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991). *See also In re Request for Assistance From Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d at 1155-56 (indicating that private party may need to be actual litigant in pending proceeding to invoke § 1728).

There is a pressing need for resolution of these conflicts. The issues are certain to recur. Indeed, they will arise more frequently as commerce becomes increasingly global in scale. The current conflicts encourage inappropriate forum-shopping. And the scope of § 1782 discovery to which NAM members, and other U.S. companies, will be subjected will be determined by the fortuity of where they are located rather than by a uniform national rule. Moreover, the Ninth

Circuit's expansive interpretation of § 1782 raises serious issues of international comity by allowing foreign litigants to circumvent the limits on discovery that foreign nations have imposed, and thereby threatens to undermine fundamental choices these nations have made about how to structure their judicial systems.

Most importantly for NAM members and other U.S. businesses, the Ninth Circuit's sweeping expansion of § 1782 discovery will inflict serious harms and lead to widespread abuse. It should go without saying that the judicial discovery process already imposes massive burdens and costs on American businesses, even in the purely domestic context. Reform efforts in this country uniformly focus on simplifying and streamlining the discovery process to make it less burdensome, costly and contentious. The Ninth Circuit's reading of § 1782 threatens a dramatic increase of the very burdens and costs that federal and state authorities in this country have been striving to control. In this case, the Ninth Circuit adopted the most sweeping interpretation of § 1782 possible, choosing at every turn to reject sensible limits that other Circuits have placed upon the availability of such review. And the court did so for reasons untethered to any purpose of Congress or to common sense. Section 1782 was enacted to further international comity by assisting foreign and international tribunals in developing evidence relevant to their functions. The Ninth Circuit has gone far beyond that objective — indeed, it has turned that objective on its head — by authorizing domestic discovery whenever a private company petitions a foreign governmental entity for relief, irrespective of whether that entity would grant the discovery and irrespective of whether it would even conduct an adjudicatory proceeding.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's expansive interpretation of 28 U.S.C. § 1782 will inflict serious practical harms on NAM members and other U.S. companies. The decision has the potential to affect each and every one of the thousands of U.S. firms that operate or export overseas — as well as their corporate affiliates, investors, officers and employees located in the United States.

To understand the scope of the problem caused by the Ninth Circuit's reading of § 1782, it is critical at the outset to bring into focus both the enormous range of foreign investigations and proceedings to which American companies are now routinely subject and the fundamental differences between our system of adjudicating legal disputes and those of most other nations of the world. U.S.-based companies are subject to the jurisdiction of foreign authorities in any number of subject areas, from intellectual property rights to environmental issues to antitrust and competition matters to basic contract disputes. Numerous foreign and international entities investigate potential legal violations by U.S. firms. Many institute investigations in response to complaints from private parties. The European Commission itself has fifteen different Directorates General governing various aspects of European Union law, from antitrust policy to customs requirements. Indeed, the European Commission entertained 1,300 complaints of infringement in 2001 alone, in addition to the investigations that the Commission instituted on its own.[2] Likewise, individual nations empower countless agencies — from

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[2] *See* http://europa.eu.int/comm/secretariat_general/sgb/droit_com/pdf/infr_statserie1_table11_en.pdf.

securities commissions to tax regulators to competition authorities — to investigate companies operating in those countries. For example, the Republic of Ireland's Competition Authority investigates monopolies, mergers and cartels, *see* www.tca.ie; the Canadian International Trade Tribunal conducts inquiries into dumping, NAFTA compliance and other trade-related issues, *see* www.citt-tcce.gc.ca; and the Australian Securities and Investments Commission inquires into various complaints about corporations, *see* www.asic.gov.au.

In foreign investigations and proceedings, discovery is typically far more limited than in American courts. *See Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 542 (1987) ("It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions . . ."). For example, "[n]othing approaching [American] out-of-court fact discovery is permitted by civil law courts" in continental Europe. Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 Am. J. Comp. L. 277, 293 (2002). Even compared to other common law legal systems, American discovery rules are far broader. *See id.* at 294 (American discovery rules provide "a set of mandatory investigation tools available to private litigants not found in the United Kingdom or elsewhere"). *See also, e.g.*, Bruce W. Bean, *Doing Business in the New Russia: Rebirth of the Russian Nation*, 35 Int'l Law. 961, 990 (2001) ("There is no discovery, as American lawyers know it, involved in Russian litigation."); Craig P. Wagnild, *Civil Law Discovery in Japan: A Comparison of Japanese and U.S. Methods of Evidence Collection in Civil Litigation*, 3 Asian-Pac. L. & Pol'y J. 1 (2002) (explaining stricter limitations on discovery

in Japanese litigation). Other countries not only place more limitations on document discovery, but also typically do not permit any testimonial discovery or discovery of entities that are not parties to the lawsuit. *See* Chase, 50 Am. L. Comp. L. at 294; *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 561 n.18 (Blackmun, J., dissenting) ("In England, for example, although document discovery is available, depositions do not exist, interrogatories have a strictly limited use, and discovery as to third parties is not generally allowed.") (citation omitted).

It is one thing for NAM members and other American companies to be subject to the jurisdiction, laws and regulatory procedures of the foreign nations in which they do business. It is quite another to subject these companies to onerous American-style discovery sought by their direct competitors — both foreign and domestic — when that discovery is unauthorized by the foreign country whose laws the competitor invokes and when the competitor is not a party to any pending or even imminent adjudicatory proceeding in a foreign country. In both of these key respects — allowing discovery that another nation would not allow and allowing discovery even where an adjudication is not imminent — the Ninth Circuit has ignored sensible, and textually supported, limitations on the scope of § 1782 imposed by other Courts of Appeals. The bizarre result of this remarkably broad interpretation of the statute is that U.S. companies and related third parties are vulnerable to wide-ranging, American-style discovery simply because they operate overseas and for no other reason.

I. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT PRIVATE ENTITIES SHOULD NOT BE PERMITTED TO INVOKE SECTION 1782 TO OBTAIN DISCOVERY IN THIS COUNTRY WHEN THE DISCOVERY IS NOT PERMITTED IN THE FOREIGN PROCEEDING THEY INVOKE TO JUSTIFY SEEKING DISCOVERY IN THIS COUNTRY.

The Ninth Circuit's interpretation of § 1782 produces unfair and abusive results, disadvantages NAM members and other U.S. firms in overseas legal battles against foreign opponents, and disregards principles of international comity.

1. Allowing § 1782 to be used in the manner it was used here will severely disadvantage American companies involved in disputes with foreign competitors who do not do substantial business in the United States. Under the Ninth Circuit's rule, such foreign competitors can obtain discovery from both U.S. firms and related third parties under broad American discovery rules, while remaining subject themselves only to the more limited rules of the jurisdiction where the foreign proceeding has been instituted.

To eliminate that inequity, several Courts of Appeals have held that private parties cannot invoke § 1782 if the information sought would not be discoverable in the foreign proceeding. *See In re Application of Asta Medica, S.A.*, 981 F.2d at 5-6; *In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d at 1156; *In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d at 310. As the First Circuit explained, "a United States party involved in litigation in a foreign country with limited pre-trial discovery

will be placed at a substantial disadvantage vis-a-vis the foreign party. All the foreign party need do is file a request for assistance under Section 1782 and the floodgates are open for unlimited discovery while the United States party is confined to restricted discovery in the foreign jurisdiction." *In re Application of Asta Medica*, 981 F.2d at 5-6. Imposing the discoverability test on private parties invoking § 1782 avoids "assisting a foreign litigant who desires to circumvent the forum nation's discovery rules by diverting a discovery request to an American court." *In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venezuela*, 42 F.3d at 310; *see also John Deere Ltd. v. Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985) (refusing to "countenance the use of U.S. discovery procedures to evade the limitations placed on domestic pre-trial disclosure by foreign tribunals").

For example, in *In re Application of Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir. 1992), a U.S. airplane engine manufacturer was subject to burdensome discovery pursuant to § 1782 merely because it filed a basic breach of contract suit in Hungarian court against Malev, the Hungarian national airline. Four days after answering the complaint in Hungarian court, Malev invoked § 1782, seeking depositions of officials of the American manufacturer as well as wide-ranging document discovery, including documents related to the manufacturer's contracts with other Eastern European national airlines and its development of certain jet engines. *See id.* at 98-99, 103. The district court denied the request because Malev had not first sought the discovery in Hungarian court, and cited the heavy burdens such an expansive reading of § 1782 would impose on U.S. courts. But the Second Circuit reversed — despite the fact that the American company had already subjected itself to the

jurisdiction of the Hungarian court and that Malev's broad discovery requests appeared to be "part of a strategy of delay and trench warfare." *Id.* at 103. The dissenting judge sharply rejected the contention that "section 1782 can be used as a matter of right against party litigants to supplant foreign procedures with discovery under United States rules," particularly "where the party and all the information sought are . . . subject to the process of the foreign court." *Id.* at 105-06 (Feinberg, J., dissenting). The dissent further predicted serious consequences for U.S. courts themselves if they continued to allow such broad discovery under § 1782: "[I]f the majority opinion stands, United States courts can be required to become global 'Special Masters for Discovery' to supervise proceedings in any court in the world . . . if either a litigant in the foreign court or its evidence can be found here." *Id.* at 103 (Feinberg, J., dissenting) (citations and quotation marks omitted). As commentators have explained in reaction to such decisions, "[t]he statute one-sidedly makes the United States person subject to the full range of discovery, as if the case were pending in the United States, whereas the foreign adversary – unless it 'resides or is found' in the United States – is not subject to the statute and is thus obliged to provide only such evidence as it may be required to make available under the rules of the foreign tribunal." Lawrence W. Newman & Michael Burrows, *U.S. Evidence for Foreign Tribunals*, 6/30/95 N.Y.L.J. 3 (col. 1); *see also id.* ("The consequence could be the expansive, almost routine, use of United States evidence-gathering processes by litigants in foreign cases involving either United States parties or transactions with links to the United States.").

2. The Ninth Circuit's decision invites abuse even where – as here – both competitors have a significant presence in the United States. Under the Ninth Circuit's

view of § 1782, as long as a domestic entity can find a foreign market in which its rival competes, that entity can invoke a proceeding in that foreign country and then obtain discovery in this country that it otherwise could obtain only by undertaking the substantial obligations of initiating a lawsuit. Companies will, therefore, have opportunities to obtain the sensitive business information of their rivals in circumstances where they would not otherwise be entitled even to seek it.

3. The Ninth Circuit's interpretation of § 1782 also ignores principles of international comity by placing the U.S. legal system "on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation." *In re Application of Asta Medica,* 981 F.2d at 6. Broad discovery is not contemplated by the other procedural rules in foreign proceedings. As demonstrated, most foreign nations do not provide the kind of expansive discovery that the judicial systems of this nation allow. The Ninth Circuit's reading of § 1782 allows participants in foreign proceedings to end-run those limitations, and thus disrespects the fundamental choices other nations have made about how to structure their legal systems. *See* Jeffrey A. Wortman, *In Search of Discovery: The Split Between the Circuits Surrounding a Threshold Discoverability Requirement to Provide Assistance Under 28 U.S.C. § 1782*, 30 Tex. Int'l L.J. 583, 592 (1995).

II. THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT DISCOVERY MAY NOT BE OBTAINED UNDER SECTION 1782 IF A FOREIGN ADJUDICATORY PROCEEDING IS NOT PENDING OR IMMINENT.

The Ninth Circuit also inappropriately rejected another sensible limit that other Circuits have placed on the availability of § 1782 discovery: the requirement that a foreign adjudicatory proceeding be pending, or at least imminent. The provision's text makes clear that Congress did not allow private parties to seek discovery in the United States when there is no ongoing, or at least impending, "proceeding in a foreign or international tribunal." 28 U.S.C. § 1782(a). But the Ninth Circuit did just that, permitting Advanced Micro Devices to obtain American-style discovery from Intel — its chief competitor — even though the European Commission was conducting only a preliminary inquiry into potential antitrust violations, and no proceeding was even remotely imminent. *See* Pet. at 12-16; Pet. App. 3a-7a. That decision has far-reaching implications, not only for the many U.S. companies subject to European antitrust inquiries like the one at issue here, but also for companies and individuals subject to any number of investigations by foreign and international entities.

Courts interpreting § 1782 often have sensibly denied requests from foreign governmental entities serving purely an investigatory function. For example, the Second Circuit has refused to allow discovery by the Director of Inspection enforcing India's Income Tax Act because § 1782 cannot be "so broad as to include all the plethora of [foreign] administrators whose decisions affect private parties." *In re Letters Rogatory Issued by the Director of Inspection of the*

Government of India, 385 F.2d 1017, 1021 (2d Cir. 1967) (Friendly, J.). Like tax assessors, other purely investigative agencies also have been denied discovery where they had no judicial function and no judicial or quasi-judicial proceedings were contemplated. *See, e.g., In re International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d at 706 (denying request for written discovery from Brazilian investigative agency); *Fonseca v. Blumenthal*, 620 F.2d 322 (2d Cir. 1980) (per curiam) (denying request for evidence by Superintendent of Exchange Control in Colombia); *In re Letters of Request to Examine Witnesses from the Court of Queen's Bench for Manitoba, Canada*, 59 F.R.D. 625, 629 (N.D. Cal.) (denying request for testimony from Canadian Commission of Inquiry "whose purpose is to investigate and report to the executive or legislative branches of government"), *aff'd*, 488 F.2d 511 (9th Cir. 1973).

Under the Ninth Circuit's interpretation, not only can these foreign authorities obtain discovery from U.S. companies when no judicial proceeding has been contemplated, but also any party that claims to be "interested" in an investigation could do the same. As a practical matter, and as courts have recognized, such an overly broad interpretation of § 1782 invites abuse. A foreign party could request that a foreign entity investigate a U.S. company solely so that the foreign party may invoke § 1782 — even where no foreign judicial proceeding is ongoing or impending, and where the foreign party would have no grounds to institute litigation in the United States or abroad. In this way, § 1782 could be used to obtain discovery where neither foreign nor domestic law would otherwise permit it; indeed, U.S. companies could find themselves besieged with discovery requests from abroad

despite being engaged in no pending or imminent overseas litigation. And foreign prosecutors and private "interested" parties could misuse information gathered via § 1782 in any number of ways: to build an entirely different case against the U.S. firm, either in U.S. court or overseas; to blackmail certain persons within or related to the company; to profit by selling the information to other entities; or (in the case of a business rival) to compete more effectively against a U.S. firm. That cannot be what Congress intended.

Indeed, that is precisely why U.S. courts have imposed the types of limitations on § 1782 discovery that the Ninth Circuit rejected below. Several courts require — even where the request comes from a foreign government entity — that the proceeding for which the discovery is sought be imminent. That is, "to guard against abuse of section 1782, the district court must insist on reliable indications of the likelihood that [judicial or quasi-judicial] proceedings will be instituted within a reasonable time." *In re Letter of Request from Crown Prosecution Service of United Kingdom*, 870 F.2d 686, 692 (D.C. Cir. 1989); *see also In re Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago*, 848 F.2d at 1156 ("If the judge doubts that a proceeding is forthcoming, or suspects that the request is a 'fishing expedition' or a vehicle for harassment, the district court should deny the request."). These courts have recognized that even foreign government institutions may have ulterior motives for making their § 1782 requests, and that therefore U.S. courts must be cautious in their application of § 1782. As the Second Circuit put it in rejecting a request from Brazilian authorities, "[w]e imply no disrespect to the professionalism of the Brazilian investigative agencies, but we are obliged to construe the governing statute as it might be applied to a letter rogatory

from any country in the world." *In re International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d at 706; *see also In re Letters Rogatory Issued by the Director of Inspection of the Government of India*, 385 F.2d at 1020 (Congress did not "authoriz[e] a district court to execute letters rogatory whenever requested by a foreign country or a party there"). The risk of abuse is even more acute when private parties are invoking the provision, which is why the Eleventh Circuit has explained that a private individual seeking discovery "may need to be a litigant in a *pending* proceeding in order to be an 'interested person'" under § 1782. *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d at 1155 (emphasis added). Indeed, without such limitations, one could imagine a scenario where private individuals collude with foreign government officials to institute a preliminary investigation of a U.S. rival so that they can invoke § 1782 to obtain otherwise protected information from the U.S. company.

The Ninth Circuit's decision entirely ignores the careful balance struck by other courts to combat these opportunities for abuse of the American discovery process. This Court should grant certiorari and reverse.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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In the Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber, a nonprofit corporation organized under the laws of the District of Columbia, is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber believes that this case presents the Court with a valuable opportunity to clarify the scope of discovery allowed to private parties seeking information from their business rivals. In the decision below, the Ninth Circuit vastly expanded the ability of companies operating in foreign nations to seek sensitive information from their U.S.-based business rivals including Chamber members, without engaging in the risks, costs, and reciprocal burdens of litigation. If the Ninth Circuit's ruling stands, a business can obtain the right to broad discovery by merely complaining to a foreign enforcement agency.

The Ninth Circuit's ruling allows competitors to seek this discovery even if the relevant foreign nation does not allow it.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, the Chamber states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

This circumvention of foreign discovery rules can place U.S.-based companies at a substantial disadvantage by allowing their rivals to make extensive inquiries into their internal policies, strategies, and plans without allowing them a similar right of discovery.

The Chamber's members, many of which do business abroad, have a substantial interest in seeing the restoration of proper limits to the right to discovery under Section 1782.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Ninth Circuit's ruling, any company that operates abroad can obtain nearly unlimited access to the business documents and competitive plans of its business rivals by filing a complaint with the European Commission and then seeking discovery under 28 U.S.C. § 1782. Under the Ninth Circuit's decision, the company is allowed this discovery without taking on any costs or risks of litigation, even though the discovery is not necessary to the decisionmaking of the Commission. By breezing past the statutory requirements that limit Section 1782 discovery to an "interested person" "for use in a proceeding in a foreign or international tribunal" and ignoring the discovery rules of the European Commission, the Ninth Circuit's ruling, if not reviewed by this Court, would open the door to businesses seeking to harass and obtain sensitive information from their U.S.-based rivals by exploiting the liberal discovery rules of the United States.

As described in greater detail in the petition, the Ninth Circuit's decision to allow discovery that a foreign authority does not allow, and to allow that discovery even though litigation is not pending or imminent, deepens circuit splits on both of these issues. This division among the circuits continues to solidify. A recent Ninth Circuit decision, *Four Pillars Enter-*

prises Co. v. *Avery Dennison Corp.*, 308 F.3d 1075 (9th Cir. 2002), acknowledged the "divergence among the federal circuits" on the discoverability issue and followed the earlier Ninth Circuit decision to reject the requirement of discoverability in the foreign tribunal.

Given the square conflicts in the circuits, it is time for this Court to clarify the limits of Section 1782. As we will show, the Ninth Circuit's decision reads the statute to create nearly unlimited access to Section 1782 discovery, allows the circumvention of foreign discovery laws, and subjects U.S.-based businesses to a flood of discovery requests from competitors.

I. The Ninth Circuit's opinion wrongly interprets Section 1782 in the broadest possible way. Instead of limiting the term "tribunal" to a proceeding in which an adjudicative function is exercised, the opinion expands the term to include decisions whether to prosecute. Instead of limiting Section 1782 discovery to discovery for use in an imminent proceeding, the opinion allows discovery for use in any proceeding regardless of time frame. And, instead of limiting the term "interested persons" to private parties in litigation, the opinion expands the term to include anyone who files a complaint with a foreign prosecutor.

II. By refusing to restrict Section 1782 discovery to items discoverable in the foreign proceedings, the Ninth Circuit provides a mechanism to circumvent foreign discovery rules. This circumvention is contrary to the purposes of Section 1782, results in a one-sided advantage to the party seeking discovery, and unilaterally imposes U.S. discovery rules on foreign nations.

III. If the Ninth Circuit's ruling is allowed to stand, any competitor that seeks information from a business rival will be allowed to gather that information by merely filing a complaint

with a foreign prosecutor. As a result, U.S.-based businesses will be forced to endure costly, time-consuming discovery that is nothing more than a fishing expedition.

ARGUMENT

I. THE NINTH CIRCUIT'S OVERLY BROAD INTERPRETATION OF SECTION 1782 STRETCHES THE SCOPE OF THE STATUTE PAST ITS LIMITS

At every turn, the Ninth Circuit's decision reads the terms of Section 1782 in the broadest possible way. Its expansive reading of "tribunal," its refusal to set a time limit on the "use" of discovery, and its refusal to limit the interpretation of "interested person" provide the opportunity for private parties to abuse Section 1782.

A. Section 1782 allows discovery "for use in a foreign or international tribunal." The Ninth Circuit's decision expands the term "tribunal" to include an agency deciding whether to prosecute an alleged violation of the law. Pet. App. 5a-7a. This holding squarely conflicts with the decisions of the Second Circuit.

The Second Circuit reads "tribunal" to mean a proceeding "in which an adjudicative function is being exercised." *In re Lancaster Factoring Co.*, 90 F.3d 38, 41 (2d Cir. 1996); *Fonseca* v. *Blumenthal*, 620 F.2d 322, 323 (2d Cir. 1980) ("It is evident that Congress intended 'tribunal' to have an adjudicatory connotation."). The Second Circuit has recognized correctly that the 1964 amendment to Section 1782, which replaced the phrase "judicial proceeding" with "proceeding in a foreign or international tribunal," did not go "so far as to authorize assistance 'whenever requested by a foreign country or a party there.'" *In re International Judicial Assistance for the Federa-*

tive Republic of Brazil General Universal Trading Corp., 936 F.2d 702, 705 (2d Cir. 1991) (quoting *In re Letters Rogatory Issued By Director of Inspection of Government of India*, 385 F.2d 1017, 1020 (2d Cir. 1967)). Instead, "congressional selection of the word 'tribunal' [evidences] an intention to confine assistance to those proceedings in which an adjudicative function is being exercised." *Ibid.* (citing *India*, 385 F.2d at 1020). Under this reading, the statute does not authorize "assistance to prosecuting or tax collecting authorities with responsibilities for asserting governmental interests, rather than for impartially adjudicating them." *Ibid.* (citing *India*, 385 F.2d at 1020).

The complaint Advanced Micro Devices (AMD) brought before the Directorate General-Competition (Directorate) is in the preliminary investigative stage. Pet. App. 2a. As the Ninth Circuit acknowledged, "This initial investigation is not considered an adversarial proceeding." Pet. App. 3a.[2] Rather, this preliminary investigation is a proceeding that *may* "lead[] to quasi-judicial proceedings." Pet. App. 6a. At this preliminary stage, the Directorate does not require any further information from AMD. "Upon receipt of a complaint, the Directorate first conducts a preliminary investigation. It may gather information on its own and provide the complainant with an opportunity to support its allegations." Pet. App. 3a. "The Directorate also has

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[2] "Competition proceedings before the Commission are * * * not to be regarded as adversary proceedings between the complainant and the undertaking concerned. The complainant is limited to a role which corresponds to the position, under criminal procedure, of a person who reports a matter to the authorities." *AKZO Chemie BV* v. *E.C. Comm'n*, [1987] 1 C.M.L.R. 231, 248.

the authority to seek information directly from the alleged infringer and may punish a failure to provide information with fines and penalties." Pet. App. 3a.

Having recognized for purposes of its analysis that the pending first-stage investigation is *not* itself a "proceeding in a foreign or international tribunal," the Ninth Circuit's decision is then somewhat obscure about what *future* proceeding it would consider to be such a "proceeding" in a "tribunal." At one point, the opinion suggests that it might be enough that "[a] decision not to go forward would be appealable to the Court of First Instance." Pet. App. 6a. Although the Court of First Instance certainly is a "tribunal," the speculative and temporally remote possibility of very limited judicial review of an exercise of prosecutorial discretion cannot possibly be enough to satisfy Section 1782. See Pet. 16 n.5. At other points, it appears that the Ninth Circuit held that the EC will *itself* become a "tribunal" within the meaning of Section 1782 when and if its investigation moves to the second stage. See Pet. App. 6a (rejecting Intel's argument "that the EC is not a tribunal"). As Intel explains (Pet. 14-16), however, the EC's blending of prosecutorial and adjudicative functions is fatal to such a holding, at least under the Second Circuit's test as elucidated by Judge Friendly in *India*, 385 F.2d at 1021.

The Ninth Circuit's response was that, in deciding whether to prosecute, the EC listens in an unbiased manner to both sides. Pet. App. 6a-7a (stating the blurring of "the distinction between prosecutor and decision-maker" is not "of concern" because the EC lacks "a discernable institutional bias toward a particular outcome"). The absence of bias, however, is at most a necessary condition – not a sufficient one – for a body to constitute a "tribunal" in ordinary usage.

Despite the Ninth Circuit's claim of evenhandedness, the EC is still charged with prosecutorial law enforcement. To qualify as a prosecutor rather than a "tribunal," one need not be "biased" – only zealous. No one would confuse a "fair" prosecutor with a fair judge. And recent events suggest that the EC may indeed act overzealously at times, and in a way that should invite particular caution in allowing the U.S. discovery process to be used by a competitor.

Three times in the past five months, European courts have reversed competition decisions of the Commission. The Commission's aggressive practices in the merger arena have resulted in public criticism by the European courts and commentators, particularly for excessive attention to the desires of *competitors* as opposed to *competition*. Mario Monti, the European Commissioner for Competition, just last week acknowledged criticism of the Commission decisionmaking process "for being too prone to capture by the competitors of the merging parties, who, the critics say, are able to influence excessively the investigation." Merger Control in the European Union: A Radical Reform (Nov. 7, 2002), *available at* http://www.ibanet.org/pdf/Mario_Monti_Speech.pdf.[3] Cf. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993)

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[3] See also Philip Shishkin, *EU Ruling Has Mixed Message On Vetting Of Corporate Mergers*, WALL ST. J., Oct. 28, 2002 ("European antitrust enforcers have come under fire [from European courts] for failing to prove a merger would harm competitors and consumers, or dominate the market."); Francesco Guerrera & Victor Mallet, *Court Ruling Adds to Pressure for European Antitrust Overhaul*, FIN. TIMES, Oct. 23, 2002, at 1.

(quoting *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962)) ("It is axiomatic that the [U.S.] antitrust laws were passed for 'the protection of competition, not competitors.'").

B. The Ninth Circuit's decision does not put any temporal limit on use of the discovered materials. Pet. App. 6a. Again, that holding places the Ninth Circuit in conflict with the Second Circuit. The Second Circuit requires proceedings to be "imminent – very likely to occur and very soon to occur in order to satisfy the statutory requirements." *In re Euromepa*, 154 F.3d 24, 29 (2d Cir. 1998) (quotation omitted).

The Ninth Circuit stated that the 1964 amendment, which eliminated the word "pending," justified the elimination of any timing requirement. The Second Circuit reads that amendment differently: "Curiously, the legislative history makes no mention of this change and describes the broadening of proceedings in language that raises a question as to whether the deletion of 'pending' was intentional or inadvertent." *Brazil*, 936 F.2d at 705. "If the omission of 'pending' was intended to mean 'eventually occurring,' we would expect to see at least some hint of that thought in the authoritative reports issued by the members of the Senate and House committees." *Id.* at 706.

Without a temporal limit on the use of the discovered materials, interested parties can request discovery for use in proceedings that might occur years into the future or that might never occur. For example, in *In re Ishihara Chemical Co.*, 251 F.3d 120 (2d Cir. 2001), Ishihara sought discovery under Section 1782 from one of its direct competitors for use in a patent proceeding before the Japanese patent office. While Ishihara was litigating the application of Section 1782, the Japanese patent proceeding concluded. Because the discovery could no longer be used in the patent proceeding, the Second Circuit dis-

missed the appeal as moot. *Id.* at 126. Ishihara argued that it was still entitled to discovery that would "be used in a new invalidity proceeding to be instituted in Japan." *Ibid.* Although the Second Circuit did not decide whether future litigation would be an adequate basis for Section 1782 discovery, it commented, "It is certainly questionable whether a proceeding that has yet to be initiated would satisfy § 1782's 'imminent' requirement. Ishihara is relying on mere speculation not only as to the commencement of such a proceeding, but also as to its need for discovery in such a proceeding." *Id.* at 127 n.4. Under the Ninth Circuit's decision, however, Ishihara's promise to file future litigation would be enough to justify Section 1782 discovery.

As the *Ishihara* example demonstrates, the Second Circuit's requirement that judicial proceedings be imminent protects against harassment and invasion of privacy. The imminency requirement "avoids the risks inherent in making confidential material available to investigative agencies of countries throughout the world at preliminary stages of their inquiries." *Brazil*, 936 F.2d at 706. Allowing discovery whenever proceedings are "probable" "poses dangers to legitimate privacy interests of our citizenry that we do not believe Congress intended to imperil." *Ibid.* See also *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) ("If the judge doubts that a proceeding is forthcoming, or suspects that the requirement is a 'fishing expedition' or a vehicle for harassment, the district court should deny the request.").

C. The Ninth Circuit failed to consider whether AMD, a private non-litigant, is an "interested person" within the meaning of Section 1782. The legislative history suggests that, to be an "interested person," a private party must be a party to foreign

litigation. *Trinidad & Tobago*, 848 F.2d at 1154 ("The legislative history stated that an 'interested person' can be a 'person designated by or under a foreign law, or a party to the foreign or international litigation.'") (quoting S. Rep. 1580, 1964 U.S.C.C.A.N. at 3789); *Lancaster Factoring Co.*, 90 F.3d at 41 (same). See also *Trinidad & Tobago*, 848 F.2d at 1155 ("a private individual may need to be a litigant in a pending proceeding in order to be an 'interested person'").

This restriction provides a sensible limit on private parties' seeking discovery under Section 1782. A litigant in a proceeding requires information to prosecute or defend its case. A mere complainant to a prosecutorial body does not possess the same need for discovery. In this case, for example, the Directorate has its own investigative powers and can request any discovery AMD could seek under Section 1782. Moreover, AMD does not have a stake in the Directorate's investigation. The Directorate's decision will not directly affect AMD. AMD's only "interest" in the preliminary investigation is to see that the competition law is enforced (or, more cynically, that the costs and burdens of an investigation and the threat sanctions are imposed upon its rival).[4] Under this view of "interest," any competitor of a company under investigation or any person interested in the proper enforcement of the competition laws could claim to be an "interested person."

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[4] See generally Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991).

II. THE NINTH CIRCUIT'S DECISION ALLOWS BUSINESSES SEEKING INFORMATION FROM A RIVAL TO CIRCUMVENT THE RULES OF DISCOVERY

Consistent with its expansive reading of the statute, the Ninth Circuit refused to restrict discovery under Section 1782 to discovery that would be discoverable in the foreign proceeding. Pet. App. 8a. See also *Four Pillars*, 308 F.3d 1075.

In the preliminary investigative stage, the Directorate does not require any further information from the complainant. Instead, the Directorate has the authority to "gather information on its own" and "to seek information directly from the alleged infringer." Pet. App. 3a.[5] If the Directorate seeks discovery in the United States, the Attorney General will assist in obtaining that discovery. 15 U.S.C. § 6203. Although a complainant has an opportunity to provide the Directorate with information in the complainant's possession, the Directorate does not turn the investigative process over to the complainant – a business rival, who is likely to possess ulterior motives.

European courts have recognized these ulterior motives and have acknowledged that businesses might file complaints simply to gather intelligence on their rivals. European courts have condemned this practice. In *AKZO Chemie BV*, the European Court of Justice stated, "[A] third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets. Any other solution would lead to the

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[5] In fact, AMD suggested to the Directorate that it seek the documents at issue here. The Directorate declined to do so. See Supp. E.R. 6-7.

unacceptable consequence that an undertaking might be inspired to lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets." [1987] 1 C.M.L.R. 231, 259. The European Court of Justice also recognized "the extremely serious damage which could result from improper communication of documents to a competitor." *Ibid.* The Ninth Circuit's decision, however, allows complainants to circumvent this policy by providing them with a broad opportunity to seek sensitive competitive information from rivals.

AMD is not the only party to attempt to use Section 1782 to gather discovery not allowed in foreign proceedings. A number of private parties seeking discovery under Section 1782 "have been accused of conducting ad hoc discovery in an attempt to circumvent the governing foreign court's proscribed process regarding gathering of evidence." Brian Eric Bomstein & Julie M. Levitt, *Much Ado About 1782: A Look At Recent Problems With Discovery In The United States For Use In Foreign Litigation Under 28 U.S.C. § 1782*, 20 U. MIAMI INTER-AM. L. REV. 429, 465 (1989).

This circumvention of foreign discovery rules contradicts the "central intent of the 1964 amendments," which was to "clarify and liberalize existing U.S. procedures" and, according to the Senate Report, to "adjust[] those procedures to the requirements of foreign practice and procedure." *In re Asta Medica*, 981 F.2d 1, 5 (1st Cir. 1992) (quoting S. Rep. No. 1580, *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788). See also *In re Jenoptik AG*, 109 F.3d 721, 725 (Fed. Cir. 1997) (Newman, J., dissenting) ("Although 28 U.S.C. § 1782 is available to private litigants and foreign courts, its purpose is to facilitate the legitimate gathering of evidence, not to circumvent foreign laws."). "United States courts should not be a tool in

circumvention of the law of foreign countries." *Jenoptik*, 109 F.3d at 725.[6]

This circumvention results in a one-sided advantage for the party seeking discovery. In the case of litigation between a U.S. party and a foreign party, the disadvantage is obvious. Without a requirement of discoverability in the foreign jurisdiction, "a United States party involved in litigation in a foreign country with limited pre-trial discovery will be placed at a substantial disadvantage vis-à-vis the foreign party. All the foreign party need do is file a request for assistance under Section 1782 and the floodgates are open for unlimited discovery while the United States party is confined to restricted discovery in the foreign jurisdiction." *Asta Medica*, 981 F.2d at 5. "Congress did not amend Section 1782 to place United States litigants in a more detrimental position than their opponents when litigating abroad. This result would be contrary to the concept of fair play embodied in United States discovery rules and the notion that '[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.'" *Id.* at 5-6 (quoting *Société Nationale Industrielle Aérospatiale* v. *United States Dist. Court*, 482 U.S. 522, 540 n.25 (1987)). See also *In re*

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[6] Parties can also use Section 1782 to circumvent American discovery rules. "For example, where one party is involved in concurrent, related actions pending before both U.S. and foreign courts, that party might be tempted to file a Section 1782 request as a way of obtaining information otherwise unavailable under the appropriate U.S. discovery rules. The requesting party then could use the discovered information to his advantage in the U.S. proceeding." Bomstein & Levitt, *supra*, 20 U. MIAMI INTER-AM. L. REV. at 467.

Euromepa, 51 F.3d 1095, 1103 (2d Cir. 1995) (Jacobs, J., dissenting) ("The statute should not become an instrument of unilateral advantage as between the parties."). A similar lopsided advantage occurs when a foreign competitor files a complaint against a U.S.-based business. The foreign competitor can seek broad discovery of the U.S. firm's business plans and competitive strategies, but the U.S. firm cannot seek reciprocal information.

Unlike foreign magistrates or courts, private litigants do not have an institutional interest in protecting the foreign judicial process, and therefore are more likely to abuse Section 1782. In recognition of this principle, the Fifth Circuit imposes discoverability requirements on private litigants. One "reason for this is to avoid assisting a foreign litigant who desires to circumvent the forum nation's discovery rules by diverting a discovery request to an American court." *In re Letter Rogatory From First Court of First Instance in Civil Matters, Caracas Venezuela*, 42 F.3d 308, 310 (5th Cir. 1995). See also *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 136 (3d Cir. 1985) ("Concern that foreign discovery provisions not be circumvented by procedures authorized in American courts is particularly pronounced where a request for assistance issues not from letters rogatory, but from an individual litigant."); Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity: Two Illustrations Using Transnational Discovery and Breard Scenarios*, 50 CATH. U.L. REV. 591, 614, 633 (2001). Another "reason for reviewing a private litigant's request for information is out of a fear of offending the forum nation by furthering a scheme to obviate that Nation's discovery rules." *In re Letter Rogatory Caracas Venezuela*, 42 F.3d at 310-311.

"In amending Section 1782, Congress did not seek to place itself on a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation." *Asta Medica*, 981 F.2d at 6. Yet allowing parties to use Section 1782 to circumvent foreign discovery rules does exactly that. It also raises the concern that "foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws." *Ibid.*

"Few actions could more significantly impede the development of international cooperation among courts than if the courts of the United States operated to give litigants in foreign cases processes of law to which they were not entitled in the appropriate foreign tribunals." *In re Court of Comm'r of Patents for Republic of South Africa*, 88 F.R.D. 75, 77 (E.D. Pa. 1980). As one commentator stated, "The injection of American discovery procedures into foreign proceedings will otherwise be counterproductive to efficiency interests in both forums and may well trigger charges of American interference, chauvinism, or legal imperialism." Lien, *supra*, 50 CATH. U.L. REV. at 624. "[I]t is puzzling why the value judgments another country has made about the role of discovery are entitled to so little weight, since American discovery is, to say the least, both unique and not widely admired." *Id.* at 619.

III. BY REMOVING THE LIMITS ON WHO CAN SEEK DISCOVERY, THE NINTH CIRCUIT THREATENS TO SUBJECT U.S.-BASED BUSINESSES TO A FLOOD OF DISCOVERY REQUESTS AT THE INSTIGATION OF MERE COMPLAINANTS TO FOREIGN LAW ENFORCEMENT AGENCIES

The Ninth Circuit's unrestricted reading of the statute vastly expands the number of parties who may seek Section 1782 discovery. Under this reading, the "United States courts can be required to become global 'Special Masters for Discovery' to supervise proceedings in any court in the world if either a litigant in a foreign court or its evidence can be found here." *In re Malev Hungarian Airlines*, 964 F.2d 97, 103 (2d Cir. 1992) (Feinberg, J., dissenting) (alterations and quotations omitted).

The Ninth Circuit's decision exposes U.S.-based companies to costly fishing expeditions. "Because there is almost no limit on what the court may deem discoverable," an expansive reading of Section 1782 can result in "tremendous cost to the privacy interests and pocketbooks of U.S. citizens." Bomstein & Levitt, *supra*, 20 U. MIAMI INTER-AM. L. REV. at 438.

"[I]t is possible that a litigant in a foreign action would file a section 1782 request to obtain information which can be utilized as the basis for a legal action in the United States." *Id.* at 467. "Such abuse of section 1782 is at odds with U.S. notions of fair play and the manner in which U.S. courts permit discovery to be taken." *Ibid.*

The Ninth Circuit's opinion opens the door to the taking of discovery by mere complainants who have not undertaken the burdens of actual litigants in an adjudicative proceeding. It permits any company to take intrusive discovery of its commer-

cial rivals simply by asking a foreign enforcement agency to investigate them. In this case, AMD and Intel "are worldwide competitors in the microprocessor industry" (Pet. App. 2a), and the competition between the two companies is intense. David P. Hamilton, *Advanced Micro May Leapfrog Intel With Newest Chip*, WALL ST. J., Aug. 9, 1999. See also David P. Hamilton, *High Demand For Chips Lifts Intel Earnings*, WALL ST. J., Apr. 19, 2000.

Companies have incentives to seek competitive information from their rivals and to impose time-consuming and expensive discovery burdens on those rivals. See Lien, *supra*, 50 CATH. U.L. REV. at 624-625 (describing burdens and abuses of U.S. discovery). A large number of complainants could take advantage of the Ninth Circuit's expansive reading of Section 1782. Thousands of competition law matters are reviewed each year by foreign antitrust agencies. The Directorate alone receives more than 100 complaints a year. European Commission Directorate-General for Competition, XXXIst Report on Competition Policy 11 & 53 fig. 1 (2001), *available at* http://europa.eu.int/comm/competition/annual_reports/2001/competition_policy/eu.pdf. See also Paul Hofheinz & Brandon Mitchener, *In a First, EU Merger Decision is Rejected*, WALL ST. J., June 7, 2002 (Commission has reviewed more than 2000 mergers since 1990). But this is only the beginning. The Ninth Circuit's decision applies to nearly any party who files a complaint with any foreign prosecutorial body. Presumably, AMD could have complained against Intel to any competition authority anywhere in the world and obtained – if the Ninth Circuit's reasoning is correct – the discovery it seeks from Intel. A decision with such far-reaching implications should not be allowed to stand without this Court's review.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

INTEL CORPORATION, PETITIONER

v.

ADVANCED MICRO DEVICES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Section 1782 of Title 28 of the United States Code provides that a district court may order the production of documents or testimony "for use in a proceeding in a foreign or international tribunal" upon request "by a foreign or international tribunal or upon the application of any interested person." The questions presented are:

1. Whether Section 1782 authorizes a district court to order production of materials, for use in a foreign tribunal, when the foreign tribunal itself would not compel production of the materials.

2. Whether Section 1782 authorizes production of materials for presentation in an anti-competitive practice investigation by the Commission of European Communities, on the theory that the investigation will lead to "a proceeding in a foreign or international tribunal."

3. Whether, for purposes of Section 1782, a party that files a complaint with the Commission of European Communities is an "interested person."

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Solicitor General to express the views of the United States. The petition raises important and unsettled matters respecting the rights of an applicant to obtain discovery of information in United States courts under 28 U.S.C. 1782 for use "in a proceeding in a foreign or international tribunal." The United States submits that the Court should grant certiorari on the first question presented to resolve a conflict among the courts of appeals and should also grant certiorari on the remaining two questions to clarify the proper operation of the statute, including factors that should influence a district court's exercise of discretion when faced with a request under Section 1782.

STATEMENT

Intel Corporation and Advanced Micro Devices, Inc. (AMD) compete in the development and sale of micro-

processors throughout the world, including within the European Community. AMD filed a complaint with the Directorate General-Competition (Directorate) of the Commission of European Communities (European Commission) alleging that Intel was abusing its dominant market position in violation of Article 82 of the Treaty Establishing the European Community, Dec. 2002 (EC Treaty). AMD then applied to the United States District Court for the Northern District of California for an order requiring Intel to produce materials in this country pursuant to 28 U.S.C. 1782, which authorizes a district court, upon the request of a "foreign or international tribunal or upon the application of any interested person," to order production of testimony, documents, or other thing "for use in a proceeding" in the tribunal. 28 U.S.C. 1782. See App., *infra*, 1a (setting out Section 1782's full text). The district court denied AMD's request on the ground that the European Commission's ongoing investigation is not a "proceeding" within the meaning of Section 1782. Pet. App. 13a-15a. The court of appeals reversed. *Id.* at 1a-9a. That court ruled that the proceeding for which discovery is sought "is, at a minimum, one leading to quasi-judicial proceedings" and that Section 1782 does not impose "a threshold requirement that the material also be discoverable in the foreign court." *Id.* at 2a, 6a; see *id.* at 3a-9a.

1. The European Commission serves as the executive branch of the European Communities and includes numerous directorates charged with specific responsibilities. The Directorate General-Competition has responsibilities for antitrust enforcement in the European Community, including the authority to "conduct[] investigations of alleged infringement, to propose curative measures in published decisions, and to impose

fines and penalties." Pet. App. 3a. On receipt of a complaint or sua sponte, the Directorate conducts a preliminary investigation, during which it may gather information and provide the complainant with the opportunity to support its allegations. *Ibid.* The Directorate has the authority to seek information directly from the alleged infringer, to penalize an alleged infringer for failing to provide such information, and, within the European Community, to search the alleged infringer's place of business. See European Community Council Regulation 17/62, arts. 11, 14, 15(1)(b), 16(1)(c). The European Commission does not consider its initial investigation to be an adversarial proceeding. See European Commission Amicus Br. 5.

If, upon completion of the preliminary investigation, the Directorate decides not to pursue a complaint, it advises the complainant, if any, and the complainant may seek judicial review of that decision. See *Hasselblad (G.B.) Ltd.* v. *Orbinson*, [1985] Q.B. 475, 495-496 (C.A. 1984). The decision is subject to review by the Court of First Instance and, ultimately, by the Court of Justice for the European Communities, which is the court of last resort for European Community matters. See *ibid.*; *Stork Amsterdam BV* v. *European Community Comm'n*, [2000] 5 C.M.L.R. 31, 42 (Ct. of First Instance 2000); *Koelman* v. *European Community Comm'n*, [1996] 4 C.M.L.R. 636, 642-643 (Ct. of First Instance). If the European Commission makes the preliminary determination that infringement has likely occurred, it serves a statement of objections on the alleged infringer, which then has an opportunity to submit written and oral comments on the statement of objections. *Hasselblad*, [1985] Q.B. at 496. If the European Commission decides to proceed with the complaint, it drafts a preliminary decision, which is

subject to further review within the Commission. If the Commission ultimately adopts a decision, that decision, as adopted, becomes a final enforceable decision within the European Community. *Ibid.*

2. Intel and AMD are United States companies that are "worldwide competitors in the microprocessor industry." Pet. App. 2a. AMD filed a complaint with the Directorate, alleging that Intel was abusing its dominant position in the European Common Market, in violation of the EC treaty and European Community regulation. *Ibid.* The Directorate's investigation is at a preliminary stage. *Ibid.*

AMD recommended that the Directorate seek discovery of documents that Intel previously produced in discovery in a United States antitrust dispute, *Intergraph Corp.* v. *Intel Corp.*, 3 F. Supp. 2d 1255 (N.D. Ala. 1998), vacated, 195 F.3d 1346 (Fed. Cir. 1999), on remand, 88 F. Supp. 2d 1288 (N.D. Ala. 2000), aff'd, 253 F.3d 695 (Fed. Cir. 2001). See Supp. E.R. 6-7. After the Directorate declined to do so, AMD petitioned a federal district court for an order directing Intel to produce the documents at issue pursuant to 28 U.S.C. 1782. Pet. App. 13a. Section 1782, entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," authorizes district courts to order the production of documents "for use in a proceeding in a foreign or international tribunal," upon the request of "a foreign or international tribunal or upon the application of any interested person." 28 U.S.C. 1782. AMD asserted that it sought the materials in connection with the complaint it filed with the European Commission. Pet. App. 13a.

The district court denied the application. Pet. App. 13a-15a. The court concluded that the Commission "performs the functions of investigator, prosecutor and

decision-maker without any separation" and views its procedures as administrative rather than judicial. *Id.* at 14a. The court ultimately ruled that Section 1782 does not authorize discovery for use in the Commission's investigation because "[a] 'proceeding' within the meaning of § 1782 means one in which an 'adjudicative function is exercised.'" *Id.* at 14a-15a (quoting *Lancaster Factoring Co.* v. *Mangone*, 90 F.3d 38, 41 (2d Cir. 1996)).

3. The court of appeals reversed. Pet. App. 1a-9a. The court observed that Section 1782's language is "broad and inclusive," extending "by way of example even [to] criminal investigations prior to formal accusation." *Id.* at 5a. The text does not distinguish, the court added, "between civil and criminal proceedings." *Ibid.* It also noted that Congress had amended Section 1782 in 1964 to eliminate its prior reference to "pending" proceedings. *Ibid.* The court of appeals stated that its previous decisions had "read the legislative history surrounding the adoption of Section 1782 broadly to include 'bodies of a quasi-judicial or administrative nature' as well as preliminary investigations leading to judicial proceedings." *Ibid.* (citing cases).

In this case, the court reasoned, because the Directorate makes recommendations to the European Commission, which issues binding enforceable decisions that are subject to judicial review, "the proceeding for which discovery is sought is, at minimum, one leading to quasi-judicial proceedings." Pet. App. 6a. There is no requirement, the court held, that the proceeding be "imminent." *Ibid.* "Although preliminary, the process qualifies as a 'proceeding before a tribunal' within the meaning of 28 U.S.C. § 1782." *Id.* at 7a.

The court of appeals also rejected Intel's argument that AMD cannot obtain discovery under Section 1782

unless it makes a threshold showing that it could obtain the materials at issue in the European Commission proceeding. Pet. App. 7a-8a. The court acknowledged disagreement among other courts of appeals on that issue. *Ibid.* But it concluded that neither the text nor the legislative history of Section 1782 "require[s] a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." *Id.* at 8a. The court reasoned that rejection of a foreign discoverability requirement is consistent with Section 1782's twin aims of "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." *Ibid.* (citing *In re Application of Malev Hungarian Airlines, Inc.*, 964 F.2d 97 (2d Cir.), cert. denied, 506 U.S. 861 (1992)). The court of appeals accordingly ruled that the district court may proceed to consider AMD's discovery request on the merits. *Id.* at 9a.

DISCUSSION

Section 1782 authorizes federal district courts to provide foreign tribunals and interested parties with assistance in obtaining evidence for use in foreign proceedings. 28 U.S.C. 1782. The proper construction of that provision plays an important role in facilitating the resolution of foreign disputes and fostering international comity. The United States does not employ Section 1782 to obtain discovery on its own behalf. The United States may, however, receive letters rogatory and letters of request through the Department of State or the Department of Justice and present them, pursuant to Section 1782, to the appropriate court. See, *e.g.*, *In re Letter Rogatory from the First Court, Caracas*, 42 F.3d 308, 309 (5th Cir. 1995). In addition,

Section 1782 provides the statutory framework through which the United States executes requests by foreign governments for witnesses or evidence in criminal matters under Mutual Legal Assistance Treaties (MLATs). See, *e.g.*, *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1290-1291 (11th Cir. 2003). The United States therefore has occasion to invoke Section 1782, and the United States interprets it in accordance with Congress's policy of encouraging international cooperation in facilitating legitimate discovery requests.

Intel correctly asserts, in support of the first of its three questions for review, that the courts of appeals are divided on whether Section 1782 authorizes production of materials only when they would be subject to compelled disclosure in the foreign proceeding in which the material would be used. That recurring issue presents a matter of considerable importance that is ripe for this Court's resolution. Intel's second and third questions, which focus on whether the European Commission's investigation into anti-competitive practices constitutes "a proceeding in a foreign or international tribunal" and whether AMD would be an "interested person" with respect to those "proceedings," present relatively narrower issues that have not generated mature conflicts among the courts of appeals. The petition nevertheless should be granted on those issues as well so that the Court may address the full range of interrelated issues raised under Section 1782 in this case.

A. The Conflict Over Whether Section 1782 Imposes A Foreign Discoverability Requirement Merits This Court's Resolution

1. The courts of appeals have divided on whether Section 1782 imposes a "foreign discoverability" requirement. Relying on the text of the statute, the

Second, Third, and Ninth Circuits have held that Section 1782 contains no such requirement. *In re Metallgesellschaft AG*, 121 F.3d 77, 79 (2d Cir. 1997); *In re Application of Gianoli Aldunate*, 3 F.3d 54, 58-59 (2d Cir.), cert. denied, 510 U.S. 965 (1993); *In re Bayer AG*, 146 F.3d 188, 191-196 (3d Cir. 1998); *Four Pillars Enters.* v. *Avery Dennison Corp.*, 308 F.3d 1075, 1080 (9th Cir. 2002); see Pet. App. 8a-9a.

In contrast, the First and Eleventh Circuits have construed 28 U.S.C. 1782 to include such a requirement implicitly. *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 5-7 (1st Cir. 1992); *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988); *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), cert. denied, 488 U.S. 1005 (1989). While the Eleventh Circuit has not explicitly explained its rationale, the First Circuit has reasoned that restricting discovery to material that would be subject to discovery in the foreign proceeding would (1) maintain parity between litigants, by declining to give one party an undue discovery advantage over the other party, and (2) avoid causing offense to a foreign tribunal in contravention of Section 1782's overarching goal of encouraging international cooperation. *Asta Medica*, 981 F.2d at 5-6.[1]

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[1] The Fourth, Fifth, and District of Columbia Circuits have noted the foreign-discoverability issue, but have not squarely resolved it. See *In re Letter of Request from Amtsgericht Ingolstadt*, 82 F.3d 590, 592 (4th Cir. 1996) (stating that discoverability requirement is not germane when requester is foreign court); *In re Letter Rogatory from the First Court, Caracas*, 42 F.3d 308, 310-311 (5th Cir. 1995) (same); *In re Letter of Request from Crown Prosecution Serv.*, 870 F.2d 686, 692 n.7 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (noting the Eleventh Circuit's *Trinidad* decision).

The conflict on whether Section 1782 implicitly contains a foreign discoverability requirement has recurring significance and warrants this Court's resolution. The conflict results in inconsistent treatment of similarly situated litigants based on the forum in which discovery is sought. Indeed, because a litigant might seek discovery under Section 1782 in more than one judicial district, the conflict can subject a single litigant to inconsistent treatment when making multiple requests for discovery in different districts. Because Section 1782 provides for discovery in response to requests from foreign or international courts and foreign officials, inconsistent judicial treatment resulting from the circuit conflict can potentially affect the United States' foreign relations.

Contrary to AMD's suggestion (Br. in Opp. 29-30), the existing conflict is unlikely to dissipate merely because the First and Eleventh Circuits cited dictum supporting a foreign discoverability requirement from a Third Circuit decision, *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132 (1985), that the Third Circuit has since disavowed. Compare *Bayer*, 146 F.3d at 193, with *Asta Medica*, 981 F.2d at 6, and *Trinidad & Tobago*, 848 F.2d 1156. It appears unlikely, as a practical matter, that both the First and Eleventh Circuits would revisit the issue en banc. This Court should therefore resolve the current disagreement over whether Section 1782 implicitly imposes such a requirement.

2. On the merits, Section 1782 does not include a *per se* requirement that the materials sought would be of a type discoverable in the foreign proceeding. The text of Section 1782 does not impose such a foreign discoverability requirement. "If Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing

amendments to the statute, it would have included statutory language to that effect." *Gianoli Aldunate*, 3 F.3d at 59.

The only arguable bases in Section 1782's text for imposing such a requirement are provisions stating that: (1) the practice and procedure prescribed by the district court for taking testimony or producing evidence "may be in whole or part the practice and procedure of the foreign country or the international tribunal"; and (2) to the extent that the district court does not prescribe otherwise, testimony shall be taken "in accordance with the Federal Rules of Civil Procedure." 28 U.S.C. 1782(a). Those statutory provisions, however, by their terms, serve as guides to the district court's exercise of its discretion; they do not impose substantive restrictions on the discovery to be had, let alone create a *per se* foreign discoverability limitation on all Section 1782 requests. See *In re Letter of Request from Crown Protective Service*, 870 F.2d 686, 692 n.6 (D.C. Cir. 1989) (noting that "[t]he district court retains discretion to prescribe other procedures" than those specified in the Federal Rules of Civil Procedure).

In imposing a foreign discoverability requirement, the First Circuit rested its decision primarily on the policy concerns of avoiding offense to foreign governments and maintaining parity between litigants. *Asta Medica*, 981 F.2d at 5-7. While those concerns, like the aspects of Section 1782 discussed above, are legitimate guideposts for the district court's exercise of discretion, they do not support application of a *per se* foreign discoverability rule. For example, if the requesting authority under Section 1782 is a foreign court or a foreign government enforcement authority, comity concerns may well *favor* disclosure. In those circumstances, courts should ordinarily order discovery with-

out a potentially offensive inquiry into the lawfulness of the request under foreign law. *In re Letter of Request from Amtsgericht Ingolstadt*, 82 F.3d 590, 592 (4th Cir. 1996); *Caracas*, 42 F.3d at 310-311.[2]

Even when the requesting entity is a private party, the unavailability of discovery under foreign law does not necessarily imply that foreign tribunals would take offense at the application of Section 1782. The foreign tribunal's laws may limit discovery out of concern that ordering production of materials located within another country would offend *that* country. See *South Carolina Ins. Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N.V.*, [1987] 1 App. Cas. 24, 41 (1986) (the House of Lords, in reversing a decision by the English Commercial Court enjoining a party to a pending reinsurance suit from seeking discovery from non-parties through Section 1782, found that the availability of discovery under Section 1782 posed no "interference with the English court's control of its own process").

3. Congress recognized in Section 1782(a) that rigid discovery rules are frequently not compatible with the wide variety of discovery requests that might emanate from foreign tribunals. Section 1782(a) accordingly provides that a district court "may order" the provision of testimony or documents and "may prescribe" the prac-

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[2] In this regard, the Eleventh Circuit has ruled that foreign government discovery requests made pursuant to an MLAT are subject only to those limitations set forth in the MLAT itself and are therefore not subject to a foreign discoverability requirement. See *Commissioner's Subpoenas*, 325 F.3d at 1304. The United States, however, has not entered into MLATs with every foreign nation. Accordingly, a foreign discoverability requirement could prevent a foreign government from obtaining requested information if the foreign government seeks that information by means other than the MLAT procedure.

tice and procedure for taking the testimony or producing the document. 28 U.S.C. 1782(a). Here, as in other contexts, Congress has granted the district courts substantial discretion in determining the appropriate response to foreign requests for judicial assistance.[3] Once the statutory prerequisites for discovery are satisfied, Section 1782 allows a district court to tailor its assistance to the particular circumstances before it and to consider comity or litigation fairness concerns that might arise in individual cases. *Metallgesellschaft AG*, 121 F.3d at 79; *Gianoli Aldunate*, 3 F.3d at 60; *Bayer AG*, 146 F.3d at 196.

The legislative history of Section 1782 reinforces that understanding. The Senate Report accompanying the 1964 revisions to Section 1782 makes clear that Congress intended to afford district courts considerable discretion in deciding whether to grant assistance under Section 1782:

> [Section 1782] leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable. In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international

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[3] See 28 U.S.C. 1696 (district court "may order service" of any document issued in connection with proceeding in foreign or international tribunal); 28 U.S.C. 1783(a) (a court "may order the issuance of a subpoena" of U.S. national or resident in foreign country, under certain circumstances). Cf. 28 U.S.C. 1781 (State Department may transmit and return letters rogatory "directly, or through suitable channels," as the agency finds most appropriate).

> tribunal, the nature of the tribunal and the character of the proceedings before it.

S. Rep. No. 1580, 88th Cong., 2d Sess. 7 (1964); see *United Kindom* v. *United States*, 238 F.3d 1312, 1319 (11th Cir.), cert. denied, 534 U.S. 891 (2001); *United States* v. *Sealed 1, Letter of Request*, 235 F.3d 1200, 1202 (9th Cir. 2000); *In re Application of Esses*, 101 F.3d 873, 876 (2d Cir. 1996).

The discretion of the district court is an important point that the Ninth Circuit did not discuss, but that is critical to the proceedings on remand. District courts have the discretion to consider foreign discoverability as a relevant factor in determining whether the request for discovery is appropriate. A district court is entitled to examine whether a request for discovery under Section 1782 is unduly burdensome or otherwise improper. See, *e.g.*, *Bayer AG* v. *Betachem, Inc.*, 173 F.3d 188, 191 (3d Cir. 1999) (affirming district court decision denying request for unredacted documents as cumulative). The court may likewise examine whether the party seeking assistance under Section 1782 is trying to circumvent foreign discovery rules or other policies of a foreign country or this nation that would make the requested discovery inappropriate. See, *e.g.*, *Four Pillars Enters.*, 308 F.3d at 1080-1081 (affirming decision to provide applicant with only limited Section 1782 assistance in light of, *inter alia*, applicant's conviction for conspiracy to steal trade secrets). The Federal Rules of Civil Procedure provide the district courts with tools for resolving such disputes.[4]

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[4] For instance, a district court can limit unreasonably broad or cumulative discovery through Federal Rule of Civil Procedure 26(b)(1), use Rule 26(c) to restrict discovery to specified terms, conditions and matters, or require an applicant to submit a

Those matters are best resolved on a case-by-case basis. For example, should a particular Section 1782 request implicate submissions to the European Commission's Leniency Program, see European Commission Amicus Br. 6-7, the district court would have the responsibility, in properly exercising its discretion over the request, to consider the Commission's views on the appropriateness of such discovery and the potential harm to the Leniency Program. See *In re Application of Merck & Co.*, 197 F.R.D. 267, 270 (M.D.N.C. 2000) (district court "has inherent authority to require that other parties to the foreign litigation be notified of the [Section 1782] application and be allowed to present their views to the Court"). "If a district court is concerned that granting discovery under § 1782 will engender problems in a particular case, it is well-equipped to determine the scope and duration of that discovery." *In re Application of Esses*, 101 F.3d at 876.

B. The Questions Whether This Case Involves A Request By An "Interested Person" For Materials To Be Used In A "Proceeding In A Foreign Or International Tribunal" Merit Clarification In The Present Context

1. Intel further seeks this Court's review of the court of appeals' holding that the investigation into anticompetitive practices by the European Community will lead to "a proceeding in a foreign or international tribunal." The petition also raises the related question whether the person filing a complaint with the European Commission is an "interested person," within the meaning of 28 U.S.C. 1782. Intel specifically urges that adjudicative proceedings must be pending or at least

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discovery plan to streamline matters and illustrate to the court that another method of discovery would not be more convenient or less burdensome.

"imminent," and that a private party requesting assistance must be a litigant in those proceedings, before Section 1782 authorizes that party to obtain discovery within the United States. Pet. 12-16 (citing, *inter alia*, *Euromepa S.A.* v. *R. Esmerian, Inc.*, 154 F.3d 24, 29 (2d Cir. 1998)).

Although Intel contends otherwise, there is no conflict between the court of appeals' decision and the Second Circuit's ruling in *In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d 702, 706 (1991), which states that an adjudicatory proceeding must be pending or imminent before a person may obtain Section 1782 assistance. *Brazil* was decided in 1991, five years before Congress's 1996 amendments to Section 1782, which expressly provided that "a proceeding in a foreign or international tribunal" includes "criminal investigations conducted before formal accusation." Act of Feb. 10, 1996, Pub. L. No. 104-106, Tit. XIII, § 1342(b), 110 Stat. 486. The specific holding of *Brazil*—that Section 1782 does not apply to a request in aid of a criminal investigation, absent an actual or imminent criminal trial—is inconsistent with the plain import of the 1996 amendments. See *Sealed 1*, 235 F.3d at 1205 (imminence requirement would preclude Section 1782 assistance before filing of actual criminal charges, "in direct conflict with the plain language of the 1996 amendment"). Intel notes that, since the 1996 amendments, the Second Circuit has continued to recite the standard set out in *Brazil*. See *Lancaster*, 90 F.3d at 42; *Euromepa*, 154 F.3d at 28. Nevertheless, that court has not yet addressed the application of Section 1782 to a foreign criminal or civil investigation, and the court has not clearly indicated how the 1996 amendments would affect its application of *Brazil* to other

situations, including requests arising from European Commission civil proceedings.

2. Despite the absence of a clear conflict, if this Court grants review on the first question presented, it could also usefully clarify the analysis that a court should conduct when a Section 1782 applicant claims to be an "interested person" seeking information for use in a "proceeding in a foreign or international tribunal," and the proceeding in the tribunal has not yet commenced.

The words "interested person" are broad and do not inherently require the applicant to be a "litigant" in a traditional judicial forum. Nor must the "proceeding" in the tribunal be pending at the time the application is made. Those conclusions follow from the text, history, and purpose of Section 1782. As a textual matter, Congress could have, but did not, restrict discovery under Section 1782 to "litigants" or "parties." Instead, it adopted the broader phrase "interested person." The legislative history indicates that the selection of that broader phrase was intentional. See S. Rep. No. 1580, 88th Cong., 2d Sess. 8 (1964) ("A request for judicial assistance under the proposed revision may * * * be made in a direct application by an interested person, *such as* a person designated by or under a foreign law, *or* a party to the foreign or international litigation.") (emphasis added). Similarly, the text does not require that the foreign proceeding be "pending" at the time of the request; to the contrary, Congress specifically amended the statute in 1964 to delete the word "pending."[5] The purpose of this and related changes to

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[5] Prior versions of Section 1782 had consistently required that the foreign proceeding be "pending." See Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769 ("If a commission or letters rogatory to take

Section 1782 was to ensure that "assistance is not confined to proceedings before conventional courts," but also extends to administrative and quasi-judicial proceedings worldwide, including "proceedings * * * pending before investigating magistrates in foreign countries." S. Rep. No. 1580, *supra*, at 7. In view of the statute's language, evolution, and intended function, there is no inherent barrier to the grant of discovery under Section 1782 to a complainant who invokes foreign procedures that are integrally linked to a later "proceeding in a foreign or international tribunal."[6]

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such testimony shall have been issued from the court in which said suit is pending".); Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949 ("The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country."); Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103 (amending Section 1782 to cover evidence sought for use "in any judicial proceeding pending in any court.").

In 1964, following Congress's creation of the Commission on International Rules of Judicial Procedure, Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, and the Commission's submission of a report, *Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, H.R. Doc. No. 88, 88th Cong., 1st Sess. (1963), Congress adopted a complete revision of Section 1782 that, *inter alia*, omitted the word "pending" and substituted the word "tribunal" for foreign "court."

[6] That conclusion is also made evident by Congress's amendment of Section 1782 in 1996 to provide that a "proceeding in a foreign or international tribunal" "includ[es] criminal investigations conducted before formal accusation." See Act of Feb. 10, 1996, Pub. L. No. 104-106, Tit. XIII, § 1342(b), 110 Stat. 486. The addition of that language underscores two important points. First, criminal investigative proceedings may support discovery *before* they have progressed to an adjudicative stage. Second, the ability to obtain discovery for use in such future criminal proceedings is an example of what is covered by discovery "for use in" a proceeding in a foreign tribunal; it is not an exception to a general rule that the proceeding in the foreign tribunal must be underway.

There are, nevertheless, important prudential considerations that limit the reach of Section 1782. Even when an applicant meets the requirements of the statute, a district court has discretion whether to grant discovery. In the exercise of that discretion, a district court should consider the nature of the pending foreign investigation as well as the imminence, certainty, and character of the future adjudicative proceedings in which the discovered material would be used. A district court is not required to grant pre-adjudication discovery simply because it has authority to do so.

3. In this case, the court of appeals was correct in ruling that Section 1782 does not categorically exclude a complainant in European Commission proceedings from seeking judicial assistance from United States courts. Nevertheless, the particular characteristics of the request in this case weigh against granting the requested discovery as a matter of discretion. The European Commission has described its pending proceeding as investigative, rather than adjudicative. European Commission Amicus Br. 4-5. While AMD filed a complaint that initiated the investigation, and that company may submit supporting material to the Commission, AMD is not the government entity conducting the investigation. And although the Commission's investigation may lead the Commission to take action, the Commission itself has not requested the district court's judicial assistance. There accordingly is no current reason to believe that the Commission would find the requested discovery of use in any future judicial proceeding. Significantly, AMD has no entitlement to initiate the civil enforcement action in which, AMD claims, the information may be used.

AMD points out that, if the Commission elects not to pursue a civil action, AMD may invoke its right to seek

judicial review of the Commission's decision not to proceed. See p. 3, *supra*. AMD cannot claim, however, a current need for judicial assistance in aid of that possible proceeding. Equally important, AMD's judicial challenge to the Commission's enforcement decision would be limited to review of the record before the Commission. Because AMD would have no right to submit new evidence in the judicial review proceeding, it could "use" evidence in that proceeding only by submitting it to the Commission in the current, investigative stage. Yet the Commission's amicus brief suggests that the Commission, which is capable itself of invoking Section 1782, does not need or want the district court's assistance.[7]

The court of appeals did not adequately acknowledge the district court's discretion to determine whether

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[7] AMD contends (Br. in Opp. 20 n.9) that it needs discovery at this juncture to avoid a "Catch-22" that would result if it were denied discovery because judicial proceedings are not occurring at present. AMD argues that "[i]f the EC decides not to issue a statement of objections, AMD is entitled to seek judicial review of that decision, * * * but judicial review is based on the evidence before the EC." *Ibid.* Thus, AMD concludes, it must have discovery now in order to use evidence in judicial review later. But AMD's situation results not from a "Catch-22," but from the European Commission's decision to structure its process with a first-stage investigation followed by a second-stage of judicial review based on the existing record. That process inherently means that the judicial review is not an evidentiary proceeding; rather, it is an analysis of the investigative record. A district court's exercise of discretion on whether to allow discovery would properly be informed by the fact that the foreign procedure accords no discovery rights to a complainant at the *investigative* stage and accords no rights to a complainant to supplement the administrative record at the *judicial review* stage. It would also be properly informed by a foreign tribunal's determination not to invoke Section 1782 and seek the information itself.

judicial assistance may be authorized but inappropriate in a particular case. There are substantial reasons why the district court could conclude, in the exercise of its discretion on remand, that such assistance should not be provided under the facts presented here. Therefore, if the Court determines that the petition for a writ of certiorari should be granted to resolve whether Section 1782 contains an implicit foreign discoverability requirement, the Court should address the other aspects of the court of appeals' ruling to ensure that the district court may appropriately exercise its discretion in further proceedings in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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* The Solicitor General is recused in this case.

APPENDIX

Section 1782 of Title 28, as amended, provides:

> **Assistance to foreign and international tribunals and to litigants before such tribunals**
>
> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.
>
> A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

Supreme Court, U.S.
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(14)

No. 02-572

IN THE

Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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GENERAL DOCKET
US Court of Appeals for the Ninth Circuit
02-15070 Advanced Micro v. Intel Corporation, et al

1/16/02	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): NO. setting schedule as follows: appellant's designation of RT is due 1/22/02; appellee's designation of RT is due 1/31/02; appellant shall order transcript by 2/11/02; court reporter shall file transcript in DC by 3/13/02; certificate of record shall be filed by 3/20/02; appellant's opening brief is due 4/29/02; appellees' brief is due 5/29/02; appellants' reply brief is due 6/12/02; [02-15070] (mhf)
1/16/02	Filed attorney for Appellant Civil Appeals Docketing Statement served on 1/10/02 (to CONFATT) [02-15070] [02-15070] (mhf)
1/18/02	Filed certificate of record on appeal RT filed in DC 1/16/02 [02-15070] (gail)
2/4/02	Filed original and 15 copies Appellant Advanced Micro opening brief (Informal: no) 22 pages and five excerpts of record in 03 volumes; served on 2/1/02 [02-15070] (gail)
2/7/02	Filed motion & order: (Deputy Clerk: cb/PROMO) Aplt's motion to expedite is granted. The answering brief is now due March 4, 2002. The answering brief shall be served personally or by overnight mail. The reply brief is due March 11, 2002. This appeal shall be placed on the next available calendar after the completion of briefing. (Motion recvd 2/4/02) [02-15070] (vt)
2/22/02	Case rejected from Circuit Mediation Program. (sa)

3/4/02	Filed original and 15 copies appellee Intel Corporation's 30 pages brief, 01 Supp'l Exc. Vols:; served on 3/4/02 [02-15070] (gail)
3/7/02	Calendar check performed [02-15070] (mw)
3/12/02	Filed original and 15 copies Advanced Micro reply brief, (Informal: no) 18 pages; served on 3/8/02 [02-15070] (gail)
3/12/02	Calendar check performed [02-15070] (aw)
3/12/02	Calendar materials being prepared. [02-15070] [02-15070] (aw)
3/20/02	Calendar materials being prepared. [02-15070] [02-15070] (mm)
3/25/02	CALENDARED: SAN FRAN May 15 2002 9:00 am Courtroom 2 * moved to Ctrm 1 *** [02-15070] (aw)
5/8/02	Filed notice of appearance of Robert E. Cooper for Aple Intel Corporation [02-15070] (gail)
5/15/02	ARGUED AND SUBMITTED TO Michael D. HAWKINS, Barry G. SILVERMAN, Jane A. Restani. [02-15070] (rc)
6/6/02	FILED OPINION: REVERSED and REMANDED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Michael D. HAWKINS, author; Barry G. SILVERMAN; Jane A. Restani.) FILED AND ENTERED JUDGMENT. [02-15070] (gail)
6/17/02	Filed Appellant Advanced Micro bill of costs, served on 6/14/02 ($1,833.75) [02-15070] (gail)
6/20/02	[4462529] Filed original and 50 copies Appellee Intel Corporation petition for panel rehearing and petition for rehearing en banc 18 p.pages. served on 6/20/02 PANEL AND

ALL ACTIVE JUDGES [02-15070] (gail)

6/28/02 Filed Appellant Advanced Micro's motion to expedite issuance of mandate and lift stay of mandate pending consideration of petition for rehearing; served on 6/25/02 [4469547] (to PANEL) [02-15070] (hh)

7/5/02 Filed order (Michael D. HAWKINS, Barry G. SILVERMAN, Jane A. Restani,): Petr-aplt shall file a response, not exceeding 15 pages in length, to resp-aple's petition for rehearing or rehearing en banc. 50 copies of the response shall be filed within 21 days of the filed date of this order. [02-15070] (hh)

7/8/02 Filed Appellee Intel Corporation's opposition to aplt's motion to expedite issuance of mandate and lift stay of mandate pending consideration of petition for rehearing [4469547-1]; served on 7/8/02 (to PANEL) [02-15070] (hh)

7/22/02 Filed Appellant Advanced Micro's original and 50 copies of the response opposing petition for enbanc rehearing, 12 pages [4462529-1] served 7/19/02, pursuant to order of 07/05/02 (PANEL AND ALL ACTIVE JUDGES) (sm)

7/29/02 Filed order (Michael D. HAWKINS, Barry G. SILVERMAN, Jane A. Restani): Appellant's motion to expedite issuance of mandate and lift stay of mandate pending consideration of petition for rehearing is DENIED. [4469547-1] [02-15070] (sm)

9/3/02 Filed order (Michael D. HAWKINS, Barry G. SILVERMAN, Jane A. Restani,): ...The petition for rehearing and the petition for rehearing en banc are DENIED. [02-15070] (hh)

9/4/02 Filed Intel Corporation motion to stay the

	mandate pending filing and disposition of certiorari [02-15070] served on 9/4/02 [4522376] FAXED PANEL (em)
9/12/02	Filed Appellant Advanced Micro response opposing appellee's motion to stay the mandate [4522376-1] served on 9/9/02 (PANEL by fax) [02-15070] (dg)
9/16/02	Filed Appellee Intel Corporation's reply in support of motion to stay issuance of the mandate [4522376-1]; served on 9/16/02 (faxed to PANEL) [02-15070] (hh)
9/24/02	Filed order (Michael D. HAWKINS, Barry G. SILVERMAN and Jane A. Restani): The motion of Intel Corporation to stay issuance of the mandate pending the filing and disposition of a petition for a writ of certiorari is DENIED. The mandate shall issue forthwith. [02-15070] (sm)
9/24/02	MANDATE ISSUED; COSTS TAXED in the amount of $1833.75. [02-15070] (sm)
10/23/02	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 02-572 filed on 10/11/02. [02-15070] (hh)
11/14/03	Received notice from Supreme Court, petition for certiorari GRANTED on 11/10/03 Supreme Court No. 2-572 (PANEL) (ji)

U.S. DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
(SAN JOSE)

CIVIL DOCKET FOR CASE #: O1-MC-7033

ADVANCED MICRO DEVICES
V.
INTEL CORPORATION

Filed: 10/01/01
Assigned to: Judge James Ware
Referred to: Judge Howard R. Lloyd
Demand: $0,000
Nature of Suit: 0
Lead Docket: None
Jurisdiction: unknown
Dkt # in USDC Alabama: is CV97-N-3023-NE

ADVANCED MICRO DEVICES, INC. Petitioner	Patrick Lynch [COR LD NTC] David I. Hurwitz [COR LD NTC] O'Melveny & Myers LLP 400 South Hope Street Los Angeles, CA 90071-28999 (213) 430-6000
v.	
INTEL CORPORATION, Respondent	Joseph Kattan [COR LD NTC] Gibson Dunn & Crutcher LLP 333 South Grand Ave Los Angeles, CA 90071-3197 (213) 229-7000

DOCKET PROCEEDINGS

DATE	#	DOCKET ENTRY
10/1/01	1	AMD'S application for order directing Intel to produce documents Miscellaneous Civil Case receipt # 10545. (vm) [Entry date 10/09/01] [Edit date 10/09/01]
10/4/01	2	NOTICE OF MOTION, APPLICATION FOR ORDER directing Intel to produce documents before Judge William A. Ingram by Advanced Micro Devic memorandum of points and authorities with Notice set for November 12, 2001, 2:00 p.m. (vm) [Entry date 10/09/01]
10/4/01	--	RECEIVED Proposed Order (Petitioner Advanced Micro Devic) re: motion memorandum of points and authorities [2-1] (vm) [Entry date 10/09/01]
10/4/01	3	DECLARATION by Patrick Lynch on behalf of Advanced Micro Devices in support of re motion and application with memorandum of points and authorities directing Intel to produce documents [2-1] (vm) [Entry date 10/09/01]
10/4/01	4	DECLARATION by Ingo Brinker on behalf of Advanced Micro Devic in support of AMD'S re motion and application with memorandum of points and authorities directing Intel to produce documents [2-1] (vm) [Entry date 10/09/01]

10/4/01	5	DECLARATION by Jeffrey Mackie-Masor on behalf of Petitioner Advanced Micro Devices in support of AMD's re motion and application for order, with memorandum of points and authorities to produce documents [2-1] (vm) [Entry date 10/09/01]
10/4/01	6	PROOF OF SERVICE by Advanced Micro Devic of declaration [5-1], declaration [4-1], declaration [3-1], order received [0-0], motion memorandum of points and authorities [2-1], [1-1] (vm) [Entry date 10/09/01]
10/16/01	7	APPLICATION before Judge William A. Ingram by Intel Corporation for attorney to appear pro hac vice. Fee status pd. #5503858 (vm) [Entry date 10/17/01]
10/16/01	--	RECEIVED Proposed Order (Intel Corporation) re: motion for attorney to appear pro hac vice. Fee status pd. #5503858 [7-11] (vm) [Entry date 10/17/01]
10/17/01	8	ORDER by Judge William A. Ingram granting order received [0-0], granting motion for attorney to appear pro hac vice. Fee status pd. #5503858 [7-1] (Date Entered: 10/17/01) (cc: all counsel) (vm)
10/18/01	9	STIPULATION and ORDER by Judge William A. Ingram: granting continuing hearing on AMD's application for order directing Intel to produce documents (cc: all counsel) (vm) [Entry date 10/23/01]
10/29/01	--	RECEIVED Proposed Order (Intel Corporation) denying Advanced Micro Devices' re: application for Discovery [2-1] (vm) [Entry date 10/30/01]

10/29/01	10	OPPOSITION by Intel Corporation to application for order [2-1] (vm) [Entry date 10/30/01]
10/29/01	11	DECLARATION by James F. Rill on behalf of Intel Corporation in support of Intel Corporation's opposition to Advanced Micro Devices' application for order (vm) [Entry date 10/30/01]
10/29/01	12	DECLARATION by Dr. Nigel Parr on behalf of Intel Corporation re opposition [10-1] (vm) [Entry date 10/30/01]
10/29/01	13	DECLARATION by Darren B. Bernhard on behalf of Intel Corporation re opposition [10-1] (vm) [Entry date 10/30/01]
10/29/01	14	PROOF OF SERVICE by Intel Corporation of declaration [13-1], declaration [12-1], declaration [11-1], opposition [10-1], order received [0-0] (vm) [Entry date 10/30/01]
11/5/01	15	REPLY by Advanced Micro Devic re opposition [10-1] (vm) [Entry date 11/07/01]
11/13/01	16	CLERK'S NOTICE for hearing previously set for November 19, 2001 will be heard on the new time Hearing will be set on Monday, December 10, 2001 at 2:00 p.m. (vm) [Entry date 11/14/01]
11/20/01	--	STIPULATION AND RECEIVED Proposed Order (Intel Corporation) re: clerk notice [16-2] to reset the hearing date on AMD's application for order directing Intel to produce documents (vm)
11/20/01	--	STIPULATION AND RECEIVED Proposed Order (Advanced Micro Devic) re: clerk notice [16-2] to reset the hearing date on AMD's application for order directing Intel to produce documents. (vm) [Entry date 11/21/01]

12/10/01	18	MINUTES: (C/R Irene Rodriguez) (Hearing Date: 12/6/01) that the motion for order directing INTEL to produce documents [2-1] is submitted (dhm) [Entry date 12/13/01]
12/11/01	17	ORDER by Judge William A. Ingram denying order received [0-0] (Date Entered: 12/12/01) (cc: all counsel) (vm) [Entry date 12/12/01]
1/7/02	19	MEMORANDUM OF DECISION by Judge William A. Ingram denying [1-1] (Date Entered: 1/8/02) (cc: all counsel) (vm) [Entry date 01/08/02]
1/11/02	20	NOTICE OF APPEAL by Advanced Micro Devic from Dist. Court decision order [17-1] December 12, 2001 denying AMD's Application. Fee status paid $105.00 receipt #5504475 (vm)
1/11/02	--	Docket fee notification form and case information sheet to USCA [20-1] (vm)
1/11/02	--	Copy of notice of appeal and docket sheet to all counsel (vm) [Entry date 01/14/02]
1/16/02	21	REPORTER'S TRANSCRIPT; Date of proceedings: 12/6/01 (C/R: I. Rodriguez) minutes [18-1] (cv) [Entry date 01/17/02]
1/17/02	--	CERTIFICATE of Record mailed to USCA, counsel notified. (cv)
1/17/02	--	NOTIFICATION by Circuit Court of Appellate Docket Number 02-15070 (vm) [Entry date 01/22/02]
1/18/02	22	TRANSCRIPT DESIGNATION and Ordering Form filed by Advanced Micro Devic for dates December 6, 2001; C/R: Irene Rodriguez; appeal [20-1] (vm) [Entry date 01/22/02]
1/22/02	23	PROOF OF SERVICE by Advanced Micro Devic of appeal [20-1] and United States Court of Appeals for the Ninth Cir-

		cuit Civil Appeals Docketing Statement (vm) [Entry date 01/28/02]
4/8/02	--	RECORD on Appeal to USCA Cnsl, notified. re appeal [20-1] (vm)
6/28/02	24	ORDER by Chief Judge Marilyn H. Patel Case reassigned to Judge James Ware referred to Judge James Ware the motion memorandum of points and authorities [2-1] () (cc: all counsel) (cv) [Entry date 07/02/02]
7/1/02	25	ORDER by Executive Committee Case reassigned to Judge James Ware () (cc: all counsel) (cv) [Entry date 07/02/02]
8/7/02	26	CERTIFIED COPY of USCA Order: Appellant's motion to expedite issuance of mandate and lift stay of mandate pending consideration of petition for rehearing is denied. 1 [20-1] (cv) [Entry date 08/08/02]
9/12/02	--	RECEIVED copy 9th Circuit Opposition to Intel's Motion to Stay Issuance of Mandate submitted by Petitioner Advanced Micro Devic (vm) [Entry date 09/25/02]
9/30/02	27	CERTIFIED COPY of USCA Order: re [20-1] The motion to stay issuance of the mandate pending the filing and disposition of a petition for a Writ of Certiorari is denied. (dhm) [Entry date 10/02/02]
10/02/02	28	NOTICE OF MOTION AND MOTION before Judge James Ware by Petitioner Advanced Micro Devic to remand on its application for order directing production of documents with Notice set for 11/18/02 at 9:00 (cv) [Entry date 10/16/02]
10/11/02	29	NOTICE by Respondent Intel Corporation of application and cross-application of Intel or order. (cv) [Entry date 10/16/02]

10/11/02	--	RECEIVED propoed order submitted by Respondent Intel Corporation (cv) [Entry date 10/16/02]
10/11/02	30	MEMORANDUM by Respondent Intel Corporation in support of notice [29-1] (cv) [Entry date 10/16/02]
10/11/02	31	PROOF OF SERVICE by Respondent Intel Corporation of memorandum [30-1], document received [0-0], notice [29-1] (cv) [Entry date 10/16/02]
10/18/02	32	NOTICE by Respondent Intel Corporation of filing of petition for a writ of certiorari. (cv)
10/18/02	33	PROOF OF SERVICE by Respondent Intel Corporation of notice [32-1] (cv) [Entry date 10/21/02]
10/28/02	34	OPPOSITION by Petitioner Advanced Micro Devic to notice [29-1] (cv) [Entry date 11/08/02]
10/28/02	35	DECLARATION by R. A. Callahan on behalf of Petitioner Advanced Micro Devic re opposition [34-1] (cv) [Entry date 11/08/02]
10/28/02	36	SUPPLEMENT by Respondent Intel Corporation opposition to AMD application for order directing production of documents, (cv) [Entry date 11/08/02]
10/28/02	37	PROOF OF SERVICE by Respondent Intel Corporation of [36-1], declaration [35-1] (cv) [Entry date 11/08/02]
11/4/02	38	REPLY by Petitioner Advanced Micro Devic re motion to remand on its application for order directing production of documents [28-1] (cv) [Entry date 11/08/02]

11/4/02	39	PROOF OF SERVICE by Respondent Intel Corporation of notice [29-1] (cv) [Entry date 11/08/02]
11/4/02	40	REPLY by Respondent Intel Corporation re notice [29-1] (cv) [Entry date 11/08/02]
11/7/02	41	CERTIFIED COPY of USCA Order: reversing and remanding the Decision of the District Court [Appeal [20-1]; Bill of Costs Attached in the amount of $1,833.75 (cv) [Entry date 11/08/02]
11/8/02	42	CLERK's letter spreading the mandate to counsel. re appeal [20-1] (cv)
11/15/02	43	CLERK'S NOTICE setting hearing on motion to remand on its application for order directing production of documents [28-1] 10:00 12/17/02 (cv) [Entry date 11/19/02]
11/18/02	44	NOTICE by Respondent Intel Corporation of filing amicus briefs (cv) [Entry date 11/19/02]
11/18/02	45	PROOF OF SERVICE by Respondent Intel Corporation of notice [44-1] (cv) [Entry date 11/19/02]
11/19/02	46	ORDER by Judge James Ware referring case for discovery to Judge Howard R. Lloyd referring to Judge Howard R. Lloyd the motion to remand on its application for order directing production of documents [28-1], (Date Entered: 11/20/02) (cc: all counsel) (cv) [Entry date 11/20/02]
11/19/02	47	ORDER by Judge Howard R. Lloyd Parties to meet and confer to attempt to resolve their discovery disagreements. They shall file by 12/10/02 a joint report detailing any unresolved requests. (Date Entered: 11/20/02) (cc: all counsel) (cv) [Entry date 11/20/02]

11/20/02	49	NOTICE by Respondent Intel Corporation of sugfestion [sic] for further proceedings on pending application . (cv) [Entry date 11/22/02]
11/20/02	50	PROOF OF SERVICE by Respondent Intel Corporation of notice [49-1] (cv) [Entry date 11/22/02]
11/21/02	48	RECORD ON APPEAL RETURNED FROM USCA [20-1] (cv)
12/3/02	51	LETTER dated 12/3/02 from R E. Cooper re: this Court is required to determine discovery requests. (cv) [Entry date 12/10/02]
12/3/02	52	PROOF OF SERVICE by Respondent Intel Corporation of letter [51-1] (cv) [Entry date 12/10/02]
12/4/02	53	NOTICE by Respondent Intel Corporation of errata re: respondent letter brief dated 12/3/02. (cv) [Entry date 12/10/02]
12/4/02	54	PROOF OF SERVICE by Respondent Intel Corporation of notice [53-1] (cv) [Entry date 12/10/02]
12/10/02	55	JOINDER by Petitioner Advanced Micro Devic, Respondent Intel Corporation of report on meeting to resolve discovery issues. (cv) [Entry date 12/11/02]
12/11/02	56	ORDER by Judge Howard R. Lloyd In court hearing will be held 10:00 1/10/03; (Date Entered: 12/13/02) (cc: all counsel) (cv) [Entry date 12/13/02]
12/19/02	57	LETTER dated 12/19/02 from Intel Corporation re: Supreme Court is likely to announce its disposition of Intel's petition for certiorari on 1/13/03. (cv)
12/19/02	58	PROOF OF SERVICE by Respondent Intel Corporation of letter [57-1] (cv)

12/23/02	59	REPLY by Respondent Intel Corporation in support of its petition for writ of certiorari filed with the this Court on 10/18/02. (cv) [Entry date 12/24/02]
12/23/02	60	PROOF OF SERVICE by Respondent Intel Corporation of reply [59-1] (cv) [Entry date 12/24/02]
12/31/02	61	AMENDED MOTION before Judge Howard R. Lloyd by Petitioner Advanced Micro Devic to produce documents with Notice set for 1/10/03 at 10:00 (cv) [Entry date 01/03/03]
12/31/02	62	NOTICE of hearing by Petitioner Advanced Micro Devic setting motion to produce documents [61-1]; hearing set for 10:00 1/10/03 (cv) [Entry date 01/03/03]
12/31/02	63	DECLARATION by P. Lynch on behalf of Petitioner Advanced Micro Devic re motion to produce documents [61-1] (cv) [Entry date 01/03/03]
12/31/02	--	RECEIVED proposed order submitted by Petitioner Advanced Micro Devic (cv) [Entry date 01/03/03]
1/7/03	64	OPPOSITION by Respondent Intel Corporation to motion to produce documents [61-1] (cv)
1/7/03	65	OPPOSITION by Respondent Intel Corporation to motion notice [62-1] /application for order to 28 USC 1782. (cv)
1/7/03	66	PROOF OF SERVICE by Respondent Intel Corporation of opposition [65-1], opposition [64-1] [cv)
1/9/03	67	REPLY by Petitioner Advanced Micro Devic re motion to produce documents [61-1] (cv)
1/10/03	68	MINUTES: (C/R tape) (Hearing Date: 1/10/03) that the motion to produce docu-

		ments [61-1] is submitted (cv) [Entry date 01/13/03]
1/13/03	69	LETTER dated 1/13/03 from Joseph Kattan re: of Order List which contains the invitation is attached to this letter. (cv) [Entry date 01/16/03]
1/13/03	70	PROOF OF SERVICE of letter [69-1] (cv) [Entry date 01/16/03]
1/22/03	71	ORDER by Judge Howard R. Lloyd granting in part AMD'S amended application re motion to produce documents [61-1] (Date Entered: 1/23/03) (cc: all counsel) (cv) [Entry date 01/23/03]
2/5/03	72	NOTICE OF MOTION AND MOTION WITH MEMORANDUM OF POINTS AND AUTHORITIES before Judge James Ware by Respondent Intel Corporation for order of De Novo determination of AMD amended aplication & Intel's cross-application; objections to Mag Judge's recommended decision and memo with Notice set for 3/17/03 at 9:00 (cv)
2/5/03	73	PROOF OF SERVICE by Respondent Intel Corporation of motion for order of De Novo determination of AMD amended aplication [sic] & Intel's cross-application; objections to Mag Judge's recommended decision and memo. [72-1] (cv)
2/5/03	--	RECEIVED stip & order (cv) [Entry date 02/06/03]
2/10/03	74	STIPULATION and ORDER by Judge Howard R. Lloyd: for protective order with addendum (cc: all counsel) (cv) [Entry date 02/11/03]

2/10/03	75	REPORTER'S TRANSCRIPT; Date of proceedings: 1/10/03 (C/R: electronic recording) minutes [68-1] (cv) [Entry date 02/11/03]
2/24/03	76	OPPOSITION by Petitioner Advanced Micro Devic to motion for order of De Novo determination of AMD amended aplication & Intel's cross-application; objections to Mag Judge's recommended decision and memo. [72-1] (cv) [Entry date 02/25/03]
3/3/03	77	REPLY by Respondent Intel Corporation re motion for order of De Novo determination of AMD amended aplication & Intel's cross-application; objections to Mag Judge's recommended decision and memo. [72-1] (cv) [Entry date 03/04/03]
3/3/03	78	PROOF OF SERVICE by Respondent Intel Corporation of reply [77-1] (cv) [Entry date 03/04/03]
3/6/03	79	ORDER VACATING 3/17/03 HEARING DATE by Judge James Ware setting hearing on motion for order of De Novo determination of AMD amended application & Intel's cross-application; objections to Mag Judge's recommended decision and memo. [72-1] tentatively reset to 9:00 7/14/03; The parties shall immediately inform the Court once the Supreme Court has ruled on Intel's petition. (Date Entered: 3/7/03) (cc: all counsel) (cv) [Entry date 03/07/03] [Edit date 06/23/03]
6/26/03	80	MEMORANDUM by Petitioner Advanced Micro Devic in support of request for hearing on Intel's appeal from order allowing discovery. (cv)

7/3/03	81	OPPOSITION by Respondent Intel Corporation to memorandum [80-1] (cv) [Entry date 07/10/03]
7/7/03	82	LETTER dated 7/7/03 from Robert Cooper re: opposition to AMD's request for hearing. (cv) [Entry date 07/10/03]
7/11/03	83	ORDER by Judge James Ware setting hearing on motion for order of De Novo determination of AMD amended aplication [sic] & Intel's cross-application; objections to Mag Judge's recommended decision and memo. [72-1] 9:00 10/20/03 (Date Entered: 7/11/03) (cc: all counsel) (cv)
10/6/03	84	NOTICE by Respondent Intel Corporation of filing Solicitor General's amicus brief and suggestion of respondent intel corp., for resetting of hearing date. (cv) [Entry date 10/07/03]
10/15/03	85	ORDER by Judge James Ware In court hearing will be held 9:00 12/1/03; and inform the Court once Supreme Court has ruled on Intel's petition. (Date Entered: 10/15/03) (cc: all counsel) (cv)
12/1/03	86	ORDER by Judge James Ware re: Vacating hearing date. (Date Entered: 12/2/03) (cc: all counsel) (cv) [Entry date 12/02/03]

COMMISSION DECISION

of 23 May 2001

on the terms of reference of hearing officers in certain competition proceedings

(notified under document number C(2001) 1461)

(Text with EEA relevance)

(2001/462/EC, ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to the Treaty establishing the European Coal and Steel Community,

Having regard to the Agreement on the European Economic Area,

Having regard to the Rules of Procedure of the Commission [1], and in particular Article 20 thereof.

Whereas:

(1) The right of the parties concerned and of third parties to be heard before a final decision affecting their interests is taken is a fundamental principle of Community law. That right is also set out in Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings [2], as last amended by Regulation (EC) No 1310/97 [3], Commission Regulation (EC) No 2842/98 of 22 December 1998 on the hearing of parties in cer-

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[1] OJ L 308, 8.12.2000, p. 26

[2] OJ L 395, 30.12.1989, p. 1 (corrected version in OJ L 257, 21.9.1990, p. 13)

[3] OJ L 180, 9.7.1997, p.1.

tain proceedings under Articles 85 and 86 of the EC Treaty ([4]) and Commission Regulation (EC) No 447/98 of 1 March 1998 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings ([5]).

(2) The Commission must ensure that that right is guaranteed in its competition proceedings, having regard in particular to the Charter of Fundamental Rights of the European Union ([6]).

(3) The conduct of administrative proceedings should therefore be entrusted to an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings.

(4) The Commission created the post of hearing officer for these purposes in 1982 and last laid down the terms of reference for that post in Commission Decision 94/810/ ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission ([7]).

(5) It is necessary to further strengthen the role of the hearing officer and to adapt and consolidate those terms of reference in the light of developments in competition law.

(6) In order to ensure the independence of the hearing officer, he should be attached, for administrative purposes, to the member of the Commission with special responsibility for competition. Transparency as regards the appointment, termination of appointment and transfer of hearing officers should be increased.

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[4] OJ L 354, 30.12.1998, p. 18.

[5] OJ L 61, 2.3.1998, p. 1.

[6] OJ C 364, 18.12.2000, p.1.

[7] OJ L 330, 21.12.1994, p. 67.

(7) The hearing officer should be appointed in accordance with the rules laid down in the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities. In accordance with those rules, consideration may be given to candidates who are not officials of the Commission.

(8) The terms of reference of the hearing officer in competition proceedings should be framed in such a way as to safeguard the right to be heard throughout the whole procedure.

(9) When disclosing information on natural persons, particular attention should be paid to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [8].

(10) This Decision should be without prejudice to the general rules granting or excluding access to Commission documents.

(11) Decision 94/810/ECSC, EC should be repealed.

HAS DECIDED AS FOLLOWS:

Article 1

The Commission shall appoint one or more hearing officers (hereinafter 'the hearing officer'), who shall ensure that the effective exercise of the right to be heard is respected in competition proceedings before the Commission under Articles 81 and 82 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty, and Regulation (EEC) No 4064/89.

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[8] OJ L 8, 12.1.2001, p.1.

Article 2

1. The appointment of the hearing officer shall be published in the *Official Journal of the European Communities*. Any interruption, termination of appointment or transfer by whatever procedure, shall be the subject of a reasoned decision of the Commission. That decision shall be published in the *Official Journal of the European Communities*.

2. The hearing officer shall be attached, for administrative purposes, to the member of the Commission with special responsibility for competition (hereinafter 'the competent member of the Commission').

3. Where the hearing officer is unable to act, the competent member of the Commission, where appropriate after consultation of the hearing officer, shall designate another official, who is not involved in the case in question, to carry out the hearing officer's duties.

Article 3

1. In performing his duties, the hearing officer shall take account of the need for effective application of the competition rules in accordance with the Community legislation in force and the principles laid down by the Court of Justice and the Court of First Instance of the European Communities.

2. The hearing officer shall be kept informed by the director responsible for investigating the case (hereinafter 'the director responsible') about the development of the procedure up to the stage of the draft decision to be submitted to the competent member of the Commission.

3. The hearing officer may present observations on any matter arising out of any Commission competition proceeding to the competent member of the Commission.

Article 4

1. The hearing officer shall organise and conduct the hearings provided for in the provisions implementing Articles 81 and 82 of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Regulation (EEC) No 4064/89, in accordance with Articles 5 to 13 of this Decision.

2. The provisions referred to in paragraph 1 are:

(a) the first paragraph of Article 36 of the ECSC Treaty;

(b) Regulation (EC) No 2842/98;

(c) Regulation (EC) No 447/98.

Article 5

The hearing officer shall ensure that the hearing is properly conducted and contributes to the objectivity of the hearing itself and of any decision taken subsequently. The hearing officer shall seek to ensure in particular that, in the preparation of draft Commission decisions, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned including the factual elements related to the gravity of any infringement.

Article 6

1. Applications to be heard from third parties, be they persons, undertakings or associations of persons or undertakings, shall be submitted in writing, together with a written statement explaining the applicant's interest in the outcome of the procedure.

2. Decisions as to whether third parties are to be heard shall be taken after consulting the director responsible.

3. Where it is found that an application has not shown a sufficient interest to be heard, he shall be informed in writing of the reasons for such finding. A time limit shall be fixed within which he may submit any further written comments.

Article 7

1. Applications to be heard orally shall be made in the applicant's written comments on letters which the Commission has addressed to him.

2. The letters referred to in paragraph 1 are those:

(a) communicating a statement of objections;

(b) inviting the written comments of a third party having shown sufficient interest to be heard;

(c) informing a complainant that in the Commission's view there are insufficient grounds for finding an infringe-

ment and inviting him to submit any further written comments.

3. Decisions as to whether applicants are to be heard orally shall be after consulting the director responsible.

Article 8

1. Where a person, an undertaing [sic] or an association of persons or undertakings has received one or more of the letters listed in Article 7(2) and has reason to believe that the Commission has in its possession documents which have not been disclosed to it and that those documents are necessary for the proper exercise of the right to be heard, access to those documents may be sought by means of a reasoned request.

2. The reasoned decision on any such request shall be communicated to the person, undertaking or association that made the request and to any other person, undertaking or association concerned by the procedure.

Article 9

Where it is intended to disclose information which may constitute a business secret of an undertaking, it shall be informed in writing of this intention and the reasons for it. A time limit shall be fixed within which the undertaking concerned may submit any written comments.

Where the undertaking concerned objects to the disclosure of the information but it is found that the information is not protected and may therefore be disclosed, that finding shall be stated in a reasoned decision which shall be notified to the undertaking concerned. The decision shall specify the date after which the information will be disclosed. This date shall not be less than one week from the date of notification.

The first and second paragraphs shall apply *mutatis mutandis* to the disclosure of information by publication in the *Official Journal of the European Communities*.

Article 10

Where a person, undertaking or association of persons or undertakings considers that the time limit imposed for its

reply to a letter referred to in Article 7(2) is too short, it may, within the original time limit, seek an extension of that time limit by means of a reasoned request. The applicant shall be informed in writing whether the request has been granted.

Article 11

Where appropriate, in view of the need to ensure that the hearing is properly prepared and particularly that questions of fact are clarified as far as possible, the hearing officer may, after consulting the director responsible, supply in advance to the parties invited to the hearing a list of the questions on which he wishes them to make known their views.

For this purpose, after consulting the director responsible, the hearing officer may hold a meeting with the parties invited to the hearing and, where appropriate, the Commission staff, in order to prepare for the hearing itself.

The hearing officer may also ask for prior written notification of the essential contents of the intended statement of persons whom the parties invited to the hearing have proposed for hearing itself.

The hearing officer may also ask for piror written notification of the essential contents of the intended statement of persons whom the parties invited to the hearing have proposed for hearing.

Article 12

1. After consulting the director responsible, the hearing officer shall determine the date, the duration and the place of the hearing. Where a postponement is requested, the hearing officer shall decide whether or not to allow it.

2. The hearing officer shall be fully responsible for the conduct of the hearing.

3. The hearing officer shall decide whether fresh documents should be admitted during the hearing, what persons should be heard on behalf of a party and whether the persons concerned should be heard separately or in the presence of other persons attending the hearing.

4. Where appropriate, in view of the need to ensure the right to be heard, the hearing officer may, after consulting the Director responsible, afford persons, undertakings, and associations of persons or undertakings the opportunity of submitting further written comments after the oral hearing. The hearing officer shall fix a date by which such submissions may be made. The Commission shall not be obliged to take into account written comments received after that date.

Article 13

1. The hearing officer shall report to the competent member of the Commission on the hearing and the conclusions he draws from it, with regard to the respect of the right to be heard. The observations in this report shall concern procedural issues, including disclosure of documents and access to the file, time limits for replying to the statement of objections and the proper conduct of the oral hearing.

A copy of the report shall be given to the Director-General for Competition and to the director responsible.

2. In addition to the report referred to in paragraph 1, the hearing officer may make observations on the further progress of the proceedings. Such observations may relate among other things to the need for further information, the withdrawal of certain objections, or the formulation of further objections.

Article 14

Where appropriate, the hearing officer may report on the objectivity of any enquiry conducted in order to assess the competition impact of commitments proposed in relation to any proceeding initiated by the Commission in application of the provisions referred to in Article 1. This shall cover in particular the selection of respondents and the methodology used.

Article 15

The hearing officer shall, on the basis of the draft decision to be submitted to the Advisory Committee in the case in question, prepare a final report in writing on the respect of the

right to be heard, as referred to in Article 13(1). This report will also consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views, and, where appropriate, the objectivity of any enquiry within the meaning of Article 14.

The final report shall be submitted to the competent member of the Commission, the Director-General for Competition and the director responsible. It shall be communicated to the competent authorities of the Member States and, in accordance with the provisions on cooperation laid down in Protocol 23 and Protocol 24 of the EEA Agreement, to the EFTA Surveillance Authority.

Article 16

1. The hearing officer's final report shall be attached to the draft decision submitted to the Commission, in order to ensure that, when it reaches a decision on an individual case, the Commission is fully apprised of all relevant information as regards the course of the procedure and respect of the right to be heard.

2. The final report may be modified by the hearing officer in the light of any amendments to the draft decision up to the time the decision is adopted by the Commission.

3. The Commission shall communicate the hearing officer's final report, together with the decision, to the addressees of the decision. It shall publish the hearing officer's final report in the *Official Journal of the European Communities*, together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

Article 17

Decision 94/810/ECSC, EC is repealed.

Procedural steps already taken under that Decision shall continue to have effect.

Done at Brussels, 23 May 2001.

For the Commission

Mario MONTI
Member of the Commission

ELEVENTH REPORT ON COMPETITION POLICY

PART ONE – COMPETITION POLICY TOWARDS ENTERPRISES

Chapter I: Main developments in Community policy

* * * *

§ 3 – Merger control

13. The Commission adopted an amended version of its proposal for a Regulation transmitted to the Council on 20 July 1973; the new proposal is now being examined by Parliament and the Economic and Social Committee. The proposed changes should enable the Council to resume the work suspended since 1978.

The amended proposal deals with two of the political problems mentioned in the Tenth Report on Competition Policy.[1]

Firstly, it defines the conditions for applying the Community rules. In assessing whether a merger is likely to give the firms concerned the power to hinder effective competition, the merger is to be presumed compatible with the common market where the market share of the goods or services concerned in the common market accounts for less than 20% of the turnover in identical or similar goods or services, unless the Commission can prove otherwise.

Secondly, the Member States are to be more closely associated in the Commission's decision-making process prior to any decision on the incompatibility of a merger. Under the amended proposal a Member State may, in certain circumstances, raise an objective in the Council which should

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[1] Tenth report on Competition Policy, point 20.

be considered as having priority over and therefore as justifying derogation from the rules concerning incompatibility.

§ 4 – Commission procedures in implementing the rules of competition

14. Wide-ranging discussion has been going in Parliament and in interested legal and economic circles on the administrative procedures relating to restrictive agreements and practices. On the one hand, there are suggestions for a simplification and acceleration of procedures and on the other, suggestions for increased procedural guarantees which have the effect of prolonging and slowing down the Commission's current procedures.[2]

The Commission takes the view that on the whole the provisions implementing Articles 85 and 86, which are based mainly on Council Regulation No. 17 and Commission Regulation No. 99/63/EEC, have stood the test of time and do not require any substantial amendments. It also considers that in practical application these procedures are fair and that they respect all the principles established by the Court of Justice. However, the Commission fully understands the concerns expressed in business circles and is therefore looking into all possible ways of making improvements, which are compatible with its task of effectively eliminating anti-competitive practices and the need for thorough analysis of the frequently complicated economic background to its decision. The Commission thus aims to allay the principal apprehensions which have emerged in its talks with interested parties, i.e., improved legal certainty for firms and additional guarantees that its assessment of cases handled is objective.

15. Legal certainty for businesses could be substantially increased by the introduction of more rapid exemption procedures, notably in the case of cooperation projects involving substantial investments. The problem now facing the Commission is essentially a practical one. The Commission is exclusively responsible for granting exemptions under Article

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[2] Point 69 of this Report.

85(3) and there are now almost 4,000 applications pending;[3] some 200 new applications are made every year. The majority of these cases fall under the block exemption regulations but many still have to be dealt with individually. The Commission is now examining ways of speeding up the general handling of such cases. It is already working on a system for dealing more efficiently and more rapidly with two types of cases.

As regards cases which at first sight raise no problems with respect to the rules of competition and do not require a formal decision, notably negative clearance, the Commission intends to pursue its policy of closing the case and informing the firms concerned by means of comfort letters. To increase the legal value of these letters, it envisages prior publication of a Notice in the Official Journal, to give interested third parties the opportunity to submit comments.

The Commission proposes to settle cases which obviously satisfy the tests of Article 85(3) by means of simplified exemption decisions, which would solve in particular the problem of the numerous cases having common features.

16. The criticism that objectiveness in procedures is not adequately guaranteed stems in the main from a feeling of insatisfaction with the fact that the Commission holds concurrently powers of investigation, examination and decision.

The investing of such power in a single authority is consistent with the classic rules of administrative law in most Member States. However, they provide for two instances of judicial review which guarantees the parties concerned both certainty as regards the judicial assessment of the substance and the review of lawfulness. At Community level there is no equivalent two-tier judicial review.

However, it can be seen from the judgments of the Court that it has dealt fully not only with questions of law but also with those of fact in actions concerning competition.

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[3] See the judgments of the Court of Justice in the *Perfumes* cases; Tenth Report on Competition Policy, point 50 *et seq.*

The complex nature of any dispute involving economic analyses inevitably increases the Court's workload. The Commission therefore favours the introduction of a two-tier system of judicial review: a court of first instance dealing with questions both of fact and of law, the court of second instance merely re-examining questions of law. The Court itself, moreover, made such a suggestion in 1978. The Commission believes that in future this reform would be the most appropriate way of improving all administrative and legal procedures relating to competition cases.

While endeavouring to maintain a balance between undertakings' individual interest as regards their rights of defence and the general interest in efficacious application of the competition rules, the Commission has taken certain practical steps to reinforce the objectiveness of its procedures, notably by making them more transparent. These measures concern investigations carried out at undertakings, access to the Commission's files and proceedings at oral hearings.

1 – Procedures during inspections

17. Undertakings regard the inspections which the Commission is empowered to undertake under Article 14 of Regulation No. 17 as serious interference in their private sphere of activity. For this reason the Commission intends, within the context of the existing rules, to improve understanding of its action in this connection by assuring firms that the exercise of these powers is strictly lawful, by specifying the scope of their legitimate rights and by guaranteeing that the information thus obtained will be utilized objectively.

18. The purpose of inspections is therefore now defined more precisely than in the past. The degree of precision naturally depends in each case on the value of the information already in the Commission's possession and the stage reached in the enquiries.

This applies both to inspections carried out on the basis of an authorization, in accordance with Article 12(2) of Regulation No. 17 and also to those carried out on the basis of a

formal Commission decision under Article 14(3). Undertakings are thus better able to check for themselves that the information requested is strictly relevant to the object of the inspection and that it is used only for the purpose for which it was requested.

19. The Commission's officials responsible for carrying out inspections have also been instructed to inform the firm concerned of the scope and limits of their powers under Article 14 of Regulation No. 17 and of its rights to consult its legal advisers. Such consultation may not, however, unduly delay the investigation or impede its progress.

20. Finally, with the view to objectiveness, the relevant facts uncovered during inspections whether favourable or unfavourable to the undertakings concerned, are assembled in the report on the inspections and taken into consideration when the Commission decides on its course of action. Since the time available to carry out inspections is inevitably limited, the Commission does, of course, rely on the undertakings concerned to draw its attention to favourable factors which it might not come across.

21. A number of difficulties stem from the fact that Community competition law has no specific rule on 'legal professional privilege'. The Commission does recognize this principle. It accepts that in practice documents seeking or giving legal advice on competition rules or on the defence of a company will not be used as evidence in establishing infringements of the competition rules.[4] The officials authorized by the Commission to carry out inspections have been instructed not to take copies of these documents. Nevertheless, the Commission believes that, subject to review by the Court of Justice, it has the right to decide whether certain documents fall into this category. The Commission is now awaiting the decision of the Court in Case 155/79 *AM & S (Europe) Ltd. v. Commission.*

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[4] Answer to Written Question No. 63/78 by Mr. Cousté: OJ C 188, 7.8.1978.

2 – Access to the Commission's files

22. The right of firms to be heard before any decision is taken against them is guaranteed by the forwarding of the statement of objections and the opportunity of replying in writing and, if necessary, orally.

23. In accordance with the case law of the Court[5] the statement of objections may be restricted to a brief, but clear, description of the facts on which the Commission bases its case, provided that it supplies, in the course of the administrative procedure, the details necessary to the defence. The Commission is not obliged to send the firms concerned all the documents on which its arguments are based; it is sufficient to forward only the documents concerning the essential facts.

The Commission accordingly already gives undertakings the opportunity of commenting on all documents and all factual information which the Commission puts forward against them in its statement of objections in cases where firms submit a request, justified by the need for a better understanding of the file, the Commission does allow them to inspect the documents themselves. The Commission also consistently informs the firms concerned, in so far as possible, of the relevant part of formal complaints.

24. The Commission is even considering going beyond the requirements laid down by the Court and allowing, in principle, firms involved in a procedure to have access to the file on the particular case. However, any such inspection is limited by the Commission's obligation to refrain from disclosing business secrets to other companies and the need to preserve the confidential nature of the Commission's internal or working documents.

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[5] Joined Cases 56 and 58/64 Grundig-Consten [1966] ECR 299; Cases 41, 44 and 45/69 Quinine [1970] ECR 661, 733, 769; Cases 48, 49 and 51/69 *Dyes_ffe* [1972] ECR 619, 711 and 745, Case 85/76 *Hoffman-LaRoche* [1979] ECR 461; Joined Cases 209 to 215 and 218/78TR Federlab [1990] ECR 3125.

25. A particular problem arises in cases where the Commission wishes to rely as against one undertaking on a document containing business secrets of another undertaking, where this latter will not release the Commission from its obligation to preserve the confidentiality of the document. Such conflicts can be solved only on a case-by-case basis. One solution the Commission has already used is to send the firm concerned a non-confidential summary of the document. It is examining other possibilities, such as inspection of the documents in question by an accountant or a 'fiduciary' ('société fiduciaire').

3 – Oral Hearings

26. The Commission's administrative procedure takes place mainly in writing and this must remain so on account of the complicated nature of the cases it examines. The oral hearing is the place to clarify certain matters which have not been settled during the written procedure and to emphasize the main lines of the case.

The Commission recognizes the need to make sure that the hearing is properly prepared and particularly that questions of fact are clarified in so far as possible. It already customarily supplies firms in advance with a list of questions on which it wishes them to outline their points of view.

The is also considering making certain changes to proceedings at the actual hearings. Although the Commission has no reason to believe that they are not conducted fairly at present it intends to emphasize the objectivity of the hearing. With this in mind it envisages appointing hearings officers, duly authorized to chair hearings, vested with genuine autonomy and the right of direct access to the responsible Member of the Commission. This would provide an even better guarantee that the Commission, when stating its views on an individual case as a decision-making authority, would be fully informed of all features of the case decision-making authority, would be fully informed of all features of the case whether favourable or unfavourable to the undertakings.

27. It must, however, be kept in mind that the Commission's procedure relating to restrictive practice and abuse of a dominant position is administrative and not judicial;[6] it must not be turned into a trial.

This is a factor to which the Commission has regard when it has to examine proposals for introducing into its procedure an independent person, who would play a decisive role from the commencement of the proceedings right up to adoption of the final decision.

Mention has been made in some interested quarters of the introduction of administrative law judges who are autonomous and are appointed in particular to the Federal Trade Commission (FTC) and who in the United States hold, like the Commission, powers of investigation and decision in the field of competition. These administrative law judges are themselves empowered to carry out investigations and of forward decisions to the FTC. The introduction of such an authority which, moreover, does not seem to have proved fully satisfactory, at any rate in the competition field, in the United States, does not seem compatible with the institutional scheme of the Treaty. In addition, it could well make procedures in individual cases even more complicated and prolonged.

Parliament[7] has proposed the possible appointment by the Court or by the Commission of persons independent of the Directorate-General for the Competition who would take part in investigations and deal with certain procedural problems. Although to a lesser degree, this solution raises many of the same problems as administrative law judges, while it would still not completely attain the goal of providing substantial additional guarantees of the right of defence.

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[6] See case law of the Court, recently reiterated in the abovementioned *Federal Case*, Tenth Report on Competition Policy, point 49.

[7] Point 41 of the Resolution on the Tenth Report on Competition Policy; point 166 of this Report.

Conclusion

28. The Commission considers that the practical steps outlined above can be expected to make a substantial improvement to its decision-making process and allay to a great extent the concern expressed in interested economic and legal circles. Only the passage of time will tell, however, whether the reforms which have been introduced will provide an adequate, completely satisfactory solution in practice. The Commission intends to put them to the test before reconsidering the whole matter again.

§ 5 – Application of the competition rules to small and medium-sized enterprises

29. Because they are a cornerstone of the industrial and commercial structure of the Community and a major source of innovation and jobs, small and medium-sized enterprises (SME) have a critical role to play, especially in the current recession. As a result, they are the subject of attention from and concern in numerous bodies at national, Community and international level.[8] As a contribution to its continuing dialogue with Parliament on this matter, the Commission sent to it, at the end of 1980, a communication taking stock of what is being done in the Community to help small and medium-sized enterprises and proposing certain measures.[9] Also the Commission emphasized and developed the important role of SME, cooperatives and local initiatives in its Communication to the Council pursuant to the 30 May 1980 Mandate entitled "Job creation: Priorities for Community Action".[10]

30. During talks with the Commission, the representatives of SME, in support of their efforts to obtain easier ac-

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[8] For example, the Council of Europe adopted on 3.7.1980 Recommendation 895 on the future of small and medium-sized businesses in Europe.

[9] COM(80) 726 final. This report was the subject of a resolution by Parliament (adopted on 19.2.1982) based on a report by its Committee on Economic and Monetary Affairs (rapporteur Mr. Deleau).

[10] COM(81) 638 final.

cess to the internal market of the Community, called in particular for the abolition of the administrative, technical and tax obstacles and of the other non-tariff barriers. Improved access to financial instruments such as the Social Fund and the Regional Fund and an adjustment of their social security contributions. Although competition policy cannot achieve such objectives alone, its role as it affects SME is far from negligible. To the extent that it really makes it possible to maintain or re-establish a competitive structure, competition policy helps create a legal and economic environment in which SME can compete, if not on equal terms, at least with the maximum chance of success, with large firms, both private and public, national and multinational, operating in the same market.

31. It is with this in mind that, in implementing the competition rules as they apply both to undertakings[11] and to action taken by Member States,[12] the Commission has not hesitated to resort, with a view to strengthening the competitive capacity of SME, to two types of measures provided for in the Treaty:

(i) The Commission considers, that very many agreements to which such undertakings are parties are not caught by the prohibition on restrictive practices.

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[11] For a detailed description of the general and specific measures taken to assist in SME, see the Seventh Report on Competition Policy, points 21 and 26.

[12] Points 244 and 245 of this Report.

REGULATION NO. 17 First Regulation Implementing Articles 85 and 86 of the Treaty

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Article 10

Liaises with the authorities of the Member States

1. The Commission shall forthwith transmit to the competent authorities of the Member States a copy of the applications and notifications together with copies of the most important documents lodged with the Commission for the purpose of establishing the existence of infringements of Articles 85 or 86 of the Treaty or of obtaining negative clearance or a decision in application of Article 85(3).

2. The Commission shall carry out the procedure set out in paragraph 1 in close and constant liaison with the competent authorities of the Member States; such authorities shall have the right to express their views upon that procedure.

3. An Advisory Committee on Restrictive Practices and Monopolies shall be consulted prior to the taking of any decision following upon a procedure under paragraph 1, and of any decision concerning the renewal, amendment or revocation of a decision pursuant to Article 85(3) of the Treaty.

4. The Advisory Committee shall be composed of officials competent in the matter of restrictive practices and monopolies. Each Member State shall appoint an official to represent it who, if prevented from attending, may be replaced by another official.

5. The consultation shall take place at a joint meeting convened by the Commission; such a meeting shall be held not earlier than fourteen days after dispatch of the notice convening it. The notice shall, in respect of each case to be examined, be accompanied by a summary of the case together with an indication of the most important documents, and a preliminary draft decision.

6. The Advisory Committee may deliver an opinion notwithstanding that some of its members or their alternates are not present. A report of the outcome of the con-

sultative proceedings shall be annexed to the draft decision. It shall not be made public.

Article 11

Requests for information

1. In carrying out the duties assigned to it by Article 89 and by provisions adopted under Article 87 of the Treaty, the Commission may obtain all necessary information from the Governments and competent authorities of the Member States and from undertakings and associations of undertakings.

2. When sending a request for information to an undertaking or association of undertakings, the Commission shall at the same time forward a copy of the request to the competent authority of the Member State in whose territory the seat of the undertaking or association of undertakings is situated.

3. In its request the Commission shall state the legal basis and the purpose of the request and also the penalties provided for in Article 15(1)(b) for supplying incorrect information.

4. The owners of the undertakings or their representatives and, in the case of legal persons, companies or firms, or of associations having no legal personality, the persons authorised to represent them by law or by their constitution shall supply the information requested.

5. Where an undertaking or association of undertakings does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission shall by decision require the information to be supplied. The decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties provided for in Article 15(1)(b) and Article 16(1)(c) and the right to have the decision reviewed by the Court of Justice.

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Advanced Micro Devices, Inc. Applicant, v. Intel Corporation, Respondent.	Case No. CIV 01 7033 MISC WAI **AMD'S APPLICATION FOR ORDER DIRECTING INTEL TO PRODUCE DOCUMENTS PURSUANT TO 28 U.S.C. § 1782 FOR USE IN EUROPEAN COMMISSION, CASE NO. COMP/C3-37.990 – AMD/INTEL**

Pursuant to 28 U.S.C. § 1782, Advanced Micro Devices, Inc. ("AMD") respectfully applies for an order to Intel Corporation ("Intel") directing that it produce in electronic format, the Intel documents produced to Intergraph Corporation in the case of Intergraph Corporation v. Intel Corporation, CV 97-N-3023-NE, United States District Court for the Northern District of Alabama, Northeast Division (the "Intergraph case") and the transcripts of depositions of Intel employees taken in the Intergraph case. AMD makes this application as a party interested in a proceeding before the European Commission, Case No. COMP/C3-37.990 - AMD/Intel.

Jurisdiction

1. The Court has jurisdiction pursuant to 28 U.S.C. § 1331. This application is made pursuant to 28 U.S.C. § 1782. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

Intradistrict Assignment

2. This application should be assigned to the San Jose Division pursuant to Civil L.R. 3-2(e).

Parties

3. AMD is a corporation organized under the laws of Delaware with its principal place of business located in Sunnyvale, California.

4. Intel is a corporation organized under the laws of Delaware with its principal place of business located in Santa Clara, California.

European Commission Proceeding

5. On October 23, 2000, AMD filed a complaint with the European Commission against Intel for engaging in anti-competitive behavior in violation of Articles 81 and 82 of the EC Treaty. The case is now pending before the European Commission, Case No. COMP/C3-37.990 - AMD/Intel.

6. AMD's complaint alleges that Intel has abused its dominant position in the Windows-capable microprocessor market through: (i) granting loyalty rebates and imposing exclusive purchasing obligations on manufacturers of personal computers and retailers which have a substantially foreclosing effect on the market; (ii) price discrimination and refusing to supply necessary components new Intel products and product information to manufacturers as retribution for buying from AMD; and (iii) entering into standard-setting cartels with other manufacturers to the competitive injury of firms not allowed timely access to the standard specifications. These practices would constitute an infringement of Article 81 and/or 82 of the EC Treaty and of Articles 53 and/or 54 of the EEA Agreement.

7. AMD is an interested party in the European Commission proceeding as the complaining party.

Intel Document Production and Deposition Testimony in Intergraph v. Intel

8. Intel produced documents and provided testimony in the Intergraph case, a private antitrust action filed by Intergraph against Intel alleging that Intel had monopolized the Windows-capable microprocessor market and associated chipsets.

9. AMD believes that the documents produced and testimony provided by Intel in the Intergraph case would be highly pertinent to the claims raised by AMD in its complaint and would be of great assistance to the European Commission in reaching a decision on AMD's claims.

10. AMD does not have access to the documents produced and transcripts of testimony provided in the Intergraph case as such documents and transcripts are subject to a protective order issued in that action.

11. It would not be overly burdensome or oppressive for Intel to produce the documents and transcripts from the Intergraph case to AMD for use in the proceeding before the European Commission as the documents are readily identifiable and Intel has gathered and reviewed the documents for privilege.

WHEREFORE, AMD prays for an order directing Intel Corporation to produce to AMD the documents Intel produced and transcripts of testimony provided in the Intergraph case, for use in the proceeding now pending before the European Commission, Case No. COMP/C3-37.990 - AMD/Intel, and for such other and further relief as the Court may deem just and proper.

Dated: September 26, 2001

PATRICK LYNCH
DAVID I. HURWITZ
O'MELVENY & MYERS LLP

By /s/ _____
PATRICK LYNCH

Attorneys for Advanced Micro Devices, Inc.

Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the named parties, there is no such interest to report.

Dated: September 26, 2001

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By /s/
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Advanced Micro Devices, Inc. Applicant, v. Intel Corporation, Respondent.	Case No. 01 7033 MISC WAI **DECLARATION OF PATRICK LYNCH IN SUPPORT OF AMD'S APPLICATION FOR ORDER DIRECTING INTEL TO PRODUCE DOCUMENTS PURSUANT TO 28 U.S.C. § 1782** Date: November 12, 2001 Time: 2 p.m. Place: Courtroom of the Honorable William A. Ingram

I, Patrick Lynch, am an attorney licensed to practice in the State of California and before this Court. I am one of the attorneys counseling Advanced Micro Devices, Inc. in the proceedings now pending before the Commission, Case COMP/C3-37.990 - AMD/Intel. I have personal knowledge of the facts stated in this declaration.

1. On October 23, 2000, AMD filed a complaint with the European Commission against Intel for engaging in anti-competitive behavior in violation of the European competition laws. (Case No. COMP/C3-37.990 – AMD/Intel.)

2. AMD's complaint alleges that Intel has abused its dominant position in the Windows-capable microprocessor market through: (i) granting loyalty rebates and imposing exclusive purchasing obligations on manufacturers of personal computers and retailers which have a substantially foreclosing effect on the market: (ii) price discrimination and refusing to supply necessary components new Intel products and product information to manufacturers as retribution for buying from AMD: and (iii) entering into standard-setting cartels with other manufacturers to the competitive injury firms not allowed timely access to the standard specifications.

3. The Commission has submitted written questions to Intel about the allegations of AMD's complaint. AMD has been given access to a redacted version of Intel's response, and it appears to AMD that Intel has evaded the obvious substance of the Commission's inquiry (and AMD's complaint). AMD has so advised the Commission.

4. In connection with its commentary on Intel's response, AMD engaged Professor Jeffrey MacKie-Mason to make an economic evaluation of Intel's position. Prof. MacKie-Mason previously served as an economic consultant to Intergraph Corporation in an action in the Northern District of Alabama charging, among other things, that Intel monopolized and attempted to monopolize the market for x86 microprocessors. As a result of this collaboration, AMD became aware that documents that Intel had produced in the Intergraph litigation would impeach positions Intel has taken with the European Commission and support AMD's allegations relating to relevant market, dominance and abuse of the dominant position. Professor MacKie-Mason actually has possession of many such documents, but is precluded by protective order from providing them to AMD or to the Commission.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 3rd day of October, 2001 at Los Angeles, California.

By /s/ _____
PATRICK LYNCH

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Advanced Micro Devices, Inc., Applicant, v. Intel Corporation, Respondent.	Case No. 01-7033 MISC WAI **DECLARATION OF INGO BRINKER IN SUPPORT OF AMD'S APPLICATION FOR ORDER DIRECTING INTEL TO PRODUCE DOCUMENTS PURSUANT TO 28 U.S.C. § 1782** Date: November 12, 2001 Time: 2 p.m. Place: Courtroom of the Honorable William A. Ingram

I, Ingo Brinker, am an attorney licensed to practice before the European Commission and am counsel to Advanced Micro Devices, Inc. in the proceedings now pending before the Commission, Case COMP/C3-37.990-AMD/Intel. I have personal knowledge of the facts stated in this declaration.

1. The Treaty establishing the European Community, as amended by the Treaty of Amsterdam, sets forth rules

regarding anti-competitive behaviour, either on the basis of bi- or multilateral agreements and/or concerted practices between business enterprises or decisions by associations of business enterprises (Art. 81 EC) or on the basis of an abuse of a dominant position within the Common Market (Art. 82 EC). Pursuant to Art. 85 EC, the Commission shall ensure the application of the principles laid down in Art. 81 and 82 EC.

2. On application by a Member State or on its own initiative the Commission shall investigate cases of suspected infringement of these principles. If it finds that there has been an infringement, it shall propose appropriate measures to bring it to an end. Pursuant to Art. 85 (2) EC, the Commission shall record such infringements of the principles in a recent decision if the infringement is not brought to an end. On the basis of an implementing regulation, adopted by the Council on the basis of Art. 83 EC, the Commission is empowered to investigate suspected infringements.

3. The Council has adopted Regulation 17/62. Pursuant to Art. 3 of this Regulation, the Commission may by decision require the business enterprises or associations of business enterprises concerned to bring such infringement to an end where the Commission finds that there is an infringement of either Art. 81 or Art. 82 EC. Pursuant to Art. 15 Regulation 17/62, the Commission may by decision impose on business enterprises fines of a sum not exceeding 10% of the turnover in the preceding business year of each of the business enterprises participating in the infringement where, either intentionally or negligently, the companies infringe Art. 81 (1) or Art. 82 EC.

4. Pursuant to Art. 3 Regulation 17/62, the Commission may investigate suspected infringements either on its own initiative or upon application either of a Member State or of a natural or legal person who claims a legitimate interest. Thus, any company who may claim a legitimate interest in the alleged infringement of another company may file a complaint with the European Commission.

5. Pursuant to the established standards recognised and acknowledged by the European Court of Justice the Commission is obliged to start a pre-investigation in order to determine the merits of such a complaint. If the Commission concludes during the pre-investigation phase that there is no infringement of either Art. 81 or 82 EC or if the Commission does not regard the violation as significant enough to be handled by the Commission, the Commission might reject the application. Under those circumstances, the Commission is required to issue a so-called Art. 6 letter to the complainant. Pursuant to Art. 6 of Commission Regulation 2842/98, the Commission has to inform the complainant about the reasons and its arguments that the complaint should be rejected. Following this letter, the complaining party is entitled to request access to the Commission's file. In addition, the complainant might ask for a public hearing. After these procedural steps, the European Commission might reject the complaint. In such a case, the complainant might file an action for annulment pursuant to Art. 230 EC with the European Court of Justice in Luxembourg.

6. If the Commission, on the contrary, intends to proceed, it prepares a so-called statement of objections. Pursuant to Art. 7 of Commission Regulation 2842/98, the Commission must include all allegations regarding the infringement of Art. 81 and/or 82 EC. The accused party has a right to comment upon the statement. In addition, the accused party might request access to the Commission's file. The accused party is also entitled to request the establishment of a public hearing. Pursuant to these procedural steps, the Commission might issue a decision against the accused party. The accused party might also file an action for annulment pursuant to Art. 230 EC to the European Court of Justice in Luxembourg.

7. The complaining party has a formal right to participate in both the pre-investigation phase as well as in the investigation procedure, i.e. after the issuance of the statement of objections. All parties participating in the procedure might submit legal briefs, documents, information, etc. In addition, all parties might present expert witness as well

as "ordinary" witnesses. As long as the Commission has not issued its statement of objections, neither party is prevented from submitting additional material. Only after the Commission has addressed the statement of objections to the accused party is the scope of the procedure confined to the allegations that have been addressed in the statement. Afterwards, the Commission might only broaden the scope if it redoes the entire procedure from the very beginning.

8. The Commission has various means for using its investigative power. The Commission might issue request for information pursuant to Art. 11 of Regulation 17/62. Pursuant to Art. 11 (4) Regulation 17/62, the owners of business enterprises or the persons authorized to represent companies or firms by law shall supply the information requested by the Commission. Where a business enterprise does not supply the information requested within the time limit fixed by the Commission, or supplies incomplete information, the Commission, on the basis of Art. 11 (5) Regulation 17/62 shall by decision require the information to be supplied. Such decision shall specify what information is required, fix an appropriate time limit within which it is to be supplied and indicate the penalties as well as the right to have the decision reviewed by the European Court of Justice. Pursuant to a most recent decision issued by the European Court of First Instance, in principle the accused party does not have a right to withhold information. Thus, the accused party is legally obliged to co-operate fully.

9. In addition, the Commission may undertake all necessary investigations to business enterprises and associations of business enterprises. To this end, the officials authorized by the Commission are empowered to examine the books and other business records, to take copies of or extracts from the books and business records, to ask for oral explanations on the spot, to enter any premises, land and means of transport of business enterprises. The officials of the Commission authorized for the purpose of the investigations shall exercise their powers upon production of an authorization in writing specifying the subject matter and purpose of the investigation and the penalties where production

of the required books or other business records is incomplete.

10. After finalizing the pre-investigation phase, the European Commission either closes the file, after having informed the complaining party pursuant to Art. 6 of Commission Regulation 2842/98, or issues a statement of objections, on the basis of Art. 7 of Commission Regulation 2842/98. After following the procedural steps described above, the Commission is authorized to issue a self-executing decision, which is based on the statement of objections and takes the written comments as well as the comments of the accused party presented in the public hearing into account. This decision is self-executing directly binding and enforceable. Thus, the Commission need not e.g. file an application with a competent court. On the contrary, the Commission is authorized to issue binding and directly enforceable legal orders.

11. Under Art. 230 EC, the accused party might file an action for annulment. The European Court of First Instance is in charge of reviewing the Commission's decision fully and to the broadest extent. The Court of First Instance is in particular authorized to review the Commission's decision on the imposition of fines. The Court can use its own discretion and might set a different fine, thereby imposing higher or lower fines on the accused party.

12. If the Court of First Instance has either confirmed or annulled the decision, either partially or entirely, either the accused party or the Commission might file an appeal with the European Court of Justice. The Court of Justice is in charge of the legal review only and reviews the Court of First Instance's decision only with regard to the observation of the procedural or substantive law. However, it does not review the factual basis of the Court of First Instance's decision.

13. The complaining party is also entitled to participate in the Court procedure. As mentioned above, the complaining party is also authorized to file an action for annulment pursuant to Art. 230 EC if the Commission decides to close

the file and to reject the complaint. If, however, the Commission renders a decision against the accused party, following the issuance of a statement of objections, the complaining party might apply for becoming involved in the court procedure if the accused party files an action for annulment against the European Commission's decision.

14. AMD as the complaining party is expected to provide the Commission with all supporting evidence that it can reasonably provide. It is important that AMD discharge this duty because of the Commission's limited resources to investigate anti-competitive behavior.

15. The Commission welcomes evidence submitted by parties where such evidence is obtained through judicial proceedings in the United States.

16. Business secrets and confidential information submitted to the Commission are protected against disclosure by the Commission's rules and regulations regarding professional secrecy.

17. Pursuant to the Agreement between the Commission of the European Communities and the Government of the United States of America regarding the application of their competition laws, the Commission and the United States Government exchange information regarding anti-competitive activities.

18. I am a graduate of the University of Chicago Law School. Based on my training in the laws of the United States, it is my opinion that the Commission performs quasi-judicial functions analogous to those of the Federal Trade Commission.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 26th day of September, 2001 at Munich, Germany.

/s/_____
Dr. Ingo Brinker

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Advanced Micro Devices, Inc., Applicant, v. Intel Corporation, Respondent.	Case No. 01-7033 MISC WAI **DECLARATION OF JEFFREY MACKIE-MASON IN SUPPORT OF AMD'S APPLICATION FOR ORDER DIRECTING INTEL TO PRODUCE DOCUMENTS PURSUANT TO 28 U.S.C. § 1782** Date: November 12, 2001 Time: 2 p.m. Place: Courtroom of the Honorable William A. Ingram

I, JEFFREY MACKIE-MASON, declare as follows:

1. I am the Arthur W. Burks Collegiate Professor of Information and Computer Science at the University of Michigan, and am also a Professor of Economics and Public Policy at the University. I have given expert opinions in a number of other antitrust cases, identified in the curriculum vitae attached hereto as Exhibit "A." That document also sets

forth all publications I have authored or co-authored within the last 10 years.

2. In 1998 I was retained by attorneys for Intergraph Corp. to offer certain economic testimony in *Intergraph v. Intel* (U.S. District Court, Northern District Alabama, Northeast Division, Civil Action No. 97-N-3023-NE) (the "*Intergraph* case"), a private antitrust action filed by Intergraph against Intel Corporation alleging, *inter alia*, that Intel had monopolized the markets for x86 microprocessors and associated chipsets. Among the actions taken by Intel that were alleged by Intergraph to have preserved or enhanced Intel's monopoly power was the failure to disclose critical interface information needed by Intergraph and other of Intel's microprocessor competitors to enable them to design products that would interoperate with products developed by Intel or with products developed by third parties with Intel's assistance.

3. In connection with my assignment for Intergraph, my staff and I reviewed over 16 thousand of pages of confidential material produced by Intel, as well as 45 volumes of confidential *Intergraph* depositions and another 17 volumes of confidential depositions from various FTC actions involving Intel that were produced in the *Intergraph* case. These documents and depositions related, broadly speaking, to the issues of: (a) the market within which Intel x86 microprocessors compete; (b) the power that Intel enjoys within that market; (c) actions taken by Intel to preserve and enhance its position in the market; and (d) the impact of the actions taken by Intel to preserve and enhance its market position. I am prohibited by the court order attached hereto as Exhibit "B" from disclosing the content of the Intel confidential materials my staff and I reviewed in connection with our work in the *Intergraph* case.

4. Subsequent to the conclusion of the *Intergraph* case, I was retained by Advanced Micro Devices ("AMD") to provide economic analysis on issues raised in a complaint that AMD had filed with the European Commission (the "Commission"). The complaint alleges, among other things, that Intel has monopolized the worldwide market for Windows-

capable i.e. x86, microprocessors by developing product interfaces in secret with selected undertakings, then delaying public disclosure of those interfaces in order to gain an artificial advantage in the marketplace. It also alleges that Intel has monopolized the market through coercive and exclusionary acts towards rivals and towards its customers that do business with its rivals. These allegations are highly similar to those made in the *Intergraph* case.

5. Many of the documents produced by Intel in the *Intergraph* case are very pertinent to the issues raised by AMD in its complaint to the European Commission and would be of great assistance to the Commission in reaching a decision on AMD's claims. Indeed, in the analysis I have been undertaking at the request of AMD, there are many issues on which I would have referred to and relied upon Intel documents I have previously reviewed were I permitted to do so. While I am bound not to disclose the content of the documents in question, I can say without disclosing their actual content that they relate directly to the most crucial issues raised by AMD, including the nature of the relevant product market; Intel's power within that market; Intel's interface development and disclosure practices; and the impact of those practices upon Intel's competitors, including AMD. I actually have possession of a number of such documents, but am precluded by protective order from providing them to AMD or to the Commission.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 27th day of September, 2001, at Ann Arbor, Michigan.

/s/_____
Jeffrey MacKie-Mason

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ADVANCED MICRO DEVICES, INC. Applicant, v. INTEL CORPORATION, Respondent.	Case No. 01-7033 MISC WAI **DECLARATION OF JAMES F. RILL IN SUPPORT OF INTEL CORPORATION'S OPPOSITION TO ADVANCED MICRO DEVICES' APPLICATION FOR ORDER** Date: November 19, 2001 Time: 2:00 P.M. Courtroom: Courtroom of the Honorable William A. Ingram

1. I am a senior partner of the law firm of Howrey Simon Arnold & White, LLP, headquartered in Washington, D.C. I served as Assistant Attorney General for the Antitrust Division of the United States Department of Justice during the first Bush Administration, from 1989-1992. In that capacity, I was the senior Justice Department official responsible for enforcing civil and criminal federal antitrust laws, developing and implementing the Justice Department's policies with respect to those laws and managing the Justice Department's Antitrust Division.

2. Much of my public and private service has been devoted to the development and implementation of policies relating to the interaction of the United States and foreign governments in enforcing the antitrust and competition laws across jurisdictions and worldwide. In addition to my responsibilities as Assistant Attorney General (which are the most pertinent to this proceeding and discussed below), I served as Co-Chair of the U.S. Department of Justice International Competition Advisory Committee, from 1997 to February 2000, having been appointed by Attorney General Janet Reno and Assistant Attorney General Joel Klein with a mandate to recommend policy initiatives to the Justice Department. I am currently Vice-Chairman of the International Business and Industry Advisory Committee ("BIAC") of the Competition Law and Policy Committee of the Organization of Economic Cooperation and Development (OECD), providing advice to antitrust enforcement officials of OECD member states. I was a member of the Advisory Board of the United States Office of Technology Assessment of Multinational Firms and the U.S. Technology Base. I currently serve as Vice Chairman of the U.S. Council for International Business, the U.S. representative body of the BIAC and the International Chamber of Commerce. I served as Chair of the Section of Antitrust Law of the American Bar Association, and am currently a member of the American Bar Association Tri-National NAFTA Task Force.

3. In my capacity as Assistant Attorney General for Antitrust, I was principally responsible for the development and implementation of the Justice Department's antitrust

policy and enforcement. During my tenure, the Department issued the 1992 *Horizontal Merger Guidelines*, the first set of antitrust enforcement guidelines issued jointly by the Department of Justice and the Federal Trade Commission. During this same period, the Department issued Revised Guidelines for International Antitrust reasserting U.S. commitment to enforcement against antitrust violations affecting U.S. foreign commerce; and the Department reinvigorated its merger enforcement activity, initiating the largest number of formal and announced merger challenges in over a decade.

4. Of particular relevance to this proceeding, I was responsible for negotiating with Sir Leon Brittan, Vice-President of the Commission of the European Communities, the Antitrust Cooperation Agreement of September 23, 1991, between the United States and the European Union. That agreement (attached hereto) sets forth the mechanisms and procedures by which the United States and the European Commission cooperate and share evidence relating to enforcement of the antitrust and competition laws of our respective jurisdictions.

The U.S. - E.U. Cooperation Agreement Governs the Manner by which the United States May Assist the European Commission in Collecting Evidence and Does Not Provide for Use of U.S. Courts by Private Third-Parties

5. The U.S. - E.U. Cooperation Agreement governs the procedure by which the instrumentalities of the United States government may assist the European Commission in obtaining documents and other information located in the United States (and vice-versa). In particular, Article V of the Agreement provides that, in the event of a possible antitrust violation affecting the European Union, the European Commission may request the United States government to initiate an enforcement investigation, including use of its compulsory process powers to obtain potentially relevant information from a private party located in the United States:

> If a Party believes that anticompetitive activities carried out on the territory of the other Party are adversely affecting its important interests, the first Party may notify the other Party and may request that the other Party's competition authorities initiate appropriate enforcement activities.

Article V.2.

6. Should the United States choose to open such an investigation and obtain documents from a private party, the Cooperation Agreement provides that those materials may be made available to the European Commission upon its request:

> Upon receiving a request from the other Party, and within the limits of Articles VII and IX, a Party will provide to the requesting Party such information within its possession as the requesting Party may describe that is relevant to an enforcement activity being considered or conducted by the requesting Party's competition authorities.

Article III.4. In the event that the information requested contains confidential information obtained from a company, the information may be released upon a written waiver from the company from which it was obtained. Article VIII. *See* 15 U.S.C. § 57b-2(b)(3)(C).

7. I have reviewed the papers submitted in this proceeding by Advanced Micro Devices, Inc. ("AMD") in support of its application for the production from Intel Corporation of documents that AMD intends to submit to the European Commission in an effort to support its antitrust allegations against Intel. Neither the officials of the European Union nor the United States envisioned that a private party could or should take it upon itself to initiate a court proceeding in the United States to obtain documents for the ostensible purpose of providing them, unsolicited, to the European Commission. I am unaware of any circumstance in which such a private party has attempted or succeeded in doing so.

8. There are sound reasons for structuring the Cooperation Agreement in a manner that does not contemplate a

private party's use of the U.S. courts to obtain evidence on behalf of the European Commission. The Agreement reflects the role of the European Commission in enforcing European Community competition laws and the relationship of private parties to the Commission. It is the European Commission, not private parties, that has responsibility for initiating an investigation, obtaining evidence and taking any enforcement measures. Unlike a private lawsuit initiated in the U.S. or Europe, the role of complaining private parties before the Commission is to cause the *Commission* to make preliminary inquiries, to persuade the Commission to initiate a formal investigation, and to provide information that the Commission may request from it in performing the Commission's functions. The Cooperation Agreement reflects this important distinction between a private lawsuit and the Commission's procedures, allowing the Commission to decide when and how to obtain information located in the United States and underscoring that private parties are not entitled to compulsory process to "assist" the Commission in its work. Nowhere does the Agreement allow private parties to take it upon themselves to use the U.S. courts or other instrumentalities of government to obtain hoped-for "evidence" that the Commission itself did not request. If the Commission, in fulfilling its responsibilities, desires those materials, there are agreed-upon established mechanisms contained in the Cooperation Agreement by which they may be obtained.

European Commission Enforcement Activities Do Not Resemble the Adjudicatory Proceedings of the Federal Trade Commission

9. Apart from the restrictions and procedures contained in the Cooperation Agreement, I understand AMD to argue that European Commission investigations and enforcement activities are adjudicative proceedings for purposes of 28 U.S.C. § 1782. In this regard, I understand that AMD seeks to analogize the European Commission's investigations with the adjudicative proceedings undertaken by the Federal Trade Commission ("FTC"). I am intimately familiar with FTC adjudicatory procedures, having practiced before the

agency for over 30 years. I worked closely with the FTC, and jointly developed policy initiatives with the FTC, during my tenure as Assistant Attorney General of the Justice Department. As Chair of the Section of Antitrust Law of the American Bar Association, I established a Special Committee to study the FTC, a committee that has been endorsed by successive FTC Chairmen.

10. I am familiar with the declaration of Nigel Parr detailing the procedures of the European Commission, and I am independently familiar with those procedures. Based on my review of that declaration, it is clear to me that the European Commission's investigative and enforcement procedures are not at all comparable to the adjudicatory functions of the Federal Trade Commission and lack the qualities that make a proceeding "adjudicative."

11. The FTC's adjudicative regulations require formal adversarial proceedings when a private party may be subject to a civil penalty under a statute administered by the agency. 15 U.S.C. § 45(b); 16 C.F.R. § 3.2. Unlike European Commission investigations described in Dr. Parr's declaration, the rules governing FTC adjudicatory proceedings separate the functions that are adversarial (and therefore not impartial) from those that are adjudicative (and therefore must remain impartial). These procedures are mandated by section 554 of the Administrative Procedure Act, 5 U.S.C. § 554, which applies to proceedings "required by statute to be determined on the record after opportunity for an agency hearing." *See Federal Trade Commission v. Standard Oil Co. of California*, 449 U.S. 232, 241 (1980). *See also* 16 C.F.R. § 3.2 ("Adjudicative proceedings are ... required by statute to be determined on the record after opportunity for an agency hearing.")

12. A review of FTC adjudicatory procedures illustrates the differences from European enforcement actions. FTC adjudicatory proceedings commence when the Commission votes to issue a complaint. 16 C.F.R. § 3.11. At that point, an Administrative Law Judge ("ALJ") is appointed, under statutory provisions designed to assure the ALJ's independence, to preside over a proceeding that closely re-

sembles a judicial proceeding and prohibits ex parte communications. The ALJ is prohibited from communicating with any other arm of the FTC regarding a matter both before the issuance of the complaint, such as when the matter is under investigation, and after the issuance of the complaint. Upon the issuance of a complaint, the Commission itself becomes subject to rules that bar it from ex parte communications regarding the matter in adjudication with any other person, including the investigative/prosecuting bureau, the respondent or the ALJ.

13. The respondent is obligated to answer the FTC's complaint, is entitled to file motions and is entitled to take discovery. Parties in an FTC proceeding are entitled to obtain discovery from any other party, as well as from third parties, using all of the familiar methods provided in the Federal Rules of Civil Procedure, so long as the information sought is "reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). Unlike European Commission investigations, FTC adjudicatory proceedings permit any party to request admissions (*Id.* at § 3.32), obtain and use deposition testimony (*Id.* at § 3.33), propound interrogatories (*Id.* at § 3.35), obtain production of documents and things (*Id.* at § 3.37), and subpoena third-parties for documents and testimony (*Id.* at § 3.34). The FTC adjudicatory rules also permit the parties to object to the provision of such discovery and to file motions to compel. *Id.* at §§ 3.37(b), 3.38. As shown in Dr. Parr's declaration, none of these adjudicatory procedures is available to respondents or other private parties before the European Commission.

14. The different procedures for conducting the hearings themselves further underscore that the European Commission does not undertake an adjudicative process. Unlike European Commission hearings, respondents before the FTC "have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument and all other rights essential to a fair hearing." 16 C.F.R. § 3.41(c). Evidence in an FTC hearing, unlike a European Commission

hearing, is not admissible unless the proponent shows that the evidence is "relevant, material, and reliable." *Id.* at § 3.43(b). The parties in an FTC hearing may object to the admissibility of evidence on these grounds. *Id.* at § 3.43(e). All testimony in FTC adjudicative proceedings must be under oath. *Id.* at 3.42(c)(1) (hearings); *Id.* at § 3.33(a) (depositions). The adjudicative procedures also provide for the issuance of subpoenas to compel the testimony of witnesses with material knowledge of matters in dispute. *Id.* at § 3.34.

15. In contrast to a European Commission investigation, the FTC Administrative Law Judge files an initial decision, based on proposed findings of fact and conclusions of law, upon closing of the hearing record. A party may appeal that decision, on specified grounds, to the five-member Commission, in a proceeding resembling an appellate court proceeding. 16 C.F.R. § 3.52. The Commission is a neutral adjudicator of a dispute between the investigative/prosecuting bureau and the respondent, and is subject to ex parte prohibitions as discussed in paragraph 12 above. In the absence of an appeal, the Commission reviews the decision and determines for itself the issues it will consider, requesting any briefing from the parties that the Commission deems appropriate. *Id.* at § 3.53. In rendering its decision, the Commission may adopt, modify or set aside the findings, conclusions, and rule or order contained in the initial decision, and includes in the decision a statement of the reasons or basis for its action and any concurring and dissenting opinions. *Id.* at § 3.54.

16. In short, the FTC, with the assistance of its Administrative Law Judges, "adjudicates" disputes in proceedings reflecting an adversarial process, due process, discovery opportunities and an initial decision-maker unconnected with the agency's prosecutorial functions. It is for these reasons that the courts, including the Supreme Court decision cited by AMD in this proceeding, characterize the FTC as having "quasi-judicial powers" in addition to its separate "quasi-legislative" powers. *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). *See Federal Trade Commission v. Atlantic Richfield Co.*, 567 F.2d 96 (D.C. Cir. 1977).

The FTC and European Commission Both Strictly Protect The Confidentiality of Documents Submitted During An Investigation

17. Although dissimilar in many ways, the FTC and the European Commission are similar in their firm prohibition against disclosure of a party's confidential documents or other information obtained by compulsory process during the course of their investigations. The FTC Act provides that "no documentary material, reports or answers to questions, and transcripts of oral testimony shall be available for examination by any individual other than a duly authorized officer or employee of the Commission without the consent of the person who produced the material or transcripts." 15 U.S.C. § 57b-2(b)(3)(C). I understand that similar rules apply to the European Commission.

18. These rules are designed to protect a party, even one under investigation, from opportunistic conduct by third-parties such as, in this case, a competitor of the party under investigation. They also serve to assist the enforcement bodies in obtaining documents and conducting their investigations. Use of 28 U.S.C. § 1782 to circumvent these confidentiality restrictions can only undermine this sound policy.

In accordance with 28 U.S.C. § 1746, I hereby declare, under penalty of perjury, that the foregoing is true and correct.

Executed this 25th day of October 2001, in New York, N.Y.

/s/
James F. Rill

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ADVANCED MICRO DEVICES, INC. Applicant, v. INTEL CORPORATION, Respondent.	Case No. CIV 01 7033 MISC WAI **DECLARATION OF DARREN B. BERNHARD IN SUPPORT OF INTEL CORPORATION'S OPPOSITION TO ADVANCED MICRO DEVICES' APPLICATION FOR ORDER** Date: November 19, 2001 Time: 2:00 p.m. Courtroom: Courtroom of the Honorable William A. Ingram

1. I am a partner in the law firm of Howrey Simon Arnold & White, LLP. and I have practiced at the firm since 1986. I was counsel of record for Intel in the FTC antitrust case against Intel (FTC Docket No. 9288), and I am counsel of record for Intel in the Intergraph matter now pending in the Northern District of Alabama (*Integraph Corp. v. Intel Corp.* CV 97-N-3023-NE, N.D. Ala). I am currently counsel for Intel in connection with the European Commission's pre-investigational inquiry regarding the complaint lodged by Advanced Micro Devices ("AMD") with the Commission against Intel. I base this Declaration upon personal knowledge and my review of pertinent records.

A. Summary Of Intergraph's Allegations

2. Intergraph was an OEM that made computer workstations specializing in high performance computer graphics.[1] Beginning in 1993, Intergraph used Intel microprocessors in its workstations. Starting in late 1996, Intergraph threatened more than 30 of Intel's customers with infringement of Intergraph's patents based on the customer's use of Intel microprocessors. The accused companies promptly sought indemnification from Intel. *See Intergraph Corp. v. Intel Corp,* 195 F.3d 1346, 1349-1350 (Fed. Cir. 1988).[2] Intel

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[1] A workstation is a high-end computer used in various applications that require greater computing performance than the typical desktop system used by businesses or individuals. For example, workstations are used by graphics companies to create 3D video used in movies, computer games, and TV animation. Workstations are also used by engineers involved in creating three-dimensional designs and blueprints.

[2] There are four reported decisions relating to Intergraph's antitrust allegations and containing relevant discussion of the issues involved in that litigation. They are *Intergraph Corp. v. Intel Corp.* 3F. Supp. 2d 1255 (N.D. Ala. 1998), *vacated,* 195 F.3d 1346 (Fed. Cir. 1998) (district court grants Intergraph's motion for a preliminary injunction); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346 (Fed. Cir. 1999) (Federal Circuit reverses district court. vacating preliminary injunction, and holding that Intergraph has no cognizable antitrust claims); *Intergraph Corp. v. Intel Corp.*, 88 F. Supp. 2d 1988 (N.D. Ala. 2000), *aff'd*, 253 F.3d 695 (Fed. Cir. 2001) (district court grants Intel's motion for summary judgment on all of Intergraph's antitrust claims); and *Intergraph Corp. v. Intel Corp.* 253

began negotiations with Intergraph about a license to the patents, but the negotiations failed and the parties' relationship deteriorated. As a result, Intel ceased treating Intergraph as a preferred customer. Intel continued supplying Intergraph with microprocessors and other products that were generally available in the marketplace, but Intel stopped providing Intergraph with non-public technical information, pre-release samples of patented microprocessors and individualized technical assistance. 195 F.3d at 1349 - 51.

3. On November 17, 1997, Intergraph sued Intel for patent infringement (after amendments Intergraph would assert five patents against Intel), seeking substantial monetary damages from Intel, as well as a permanent injunction against the sale of Intel's flagship Pentium microprocessors. Intergraph accused virtually every Intel desktop microprocessor of infringing Intergraph patents. Sales of such microprocessors constitute the majority of Intel's revenues.

4. Intergraph also sued Intel for various alleged violations of state law discussed below, and shortly thereafter amended the complaint to assert antitrust claims. In pertinent part, Intergraph's antitrust complaint alleged that Intel's decision not to supply Intergraph with patented Intel sample and pre-release microprocessors constituted monopolization of the microprocessor market in violation of Section 2 of the Sherman Act. Intergraph also alleged that Intel violated Section 2 by using its monopoly in microprocessors to leverage a competitive advantage into downstream markets of workstations, graphics accelerators and chipsets. *Id.* In addition, Intergraph brought a claim under Section 1 of the Sherman Act alleging that Intel conspired with Intergraph's workstation competitors to hinder Intergraph's sale of workstations to a few specific accounts engaged in the digital animation business.

5. Intergraph also asserted 18 separate counts of purported state law violations, all of which arose from the deal-

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F.3d 695 (Fed. Cir. 2001) (Federal Circuit affirms summary judgment for Intel on all of Intergraph's antitrust claims).

ings between Intel and Intergraph. For example, Intergraph brought state law claims for breach of contract and promissory estoppel alleging that a letter Intel sent to Intergraph in 1997 in which Intel stated that it would support Intergraph's product supply, design and manufacturing constituted a contract that was breached when Intel ceased treating Intergraph as a preferred customer after Intergraph threatened Intel and its customers with patent litigation. Intergraph also asserted claims for tortious interference with contract, alleging that Intel told a few digital media companies (companies that create animation and special effects) not to do business with Intergraph after Intergraph threatened Intel and its customers with patent infringement. Integraph brought two breach of warranty claims against Intel alleging that Intel sold Integraph defective chips. Intergraph also brought fraud claims against Intel alleging that Intel misrepresented that Integraph would continually be supplied by Intel and that Intel suppressed the fact that if Intergraph sued Intel or its customers, Intel would cease doing business with Intergraph. (See Exhibit 1 hereto attaching Intergraph Complaints.)[3]

6. Intergraph made no allegations in its complaints with respect to conduct in Europe. More specifically, Intergraph made no claim that Intel interfered with its business relations with any European-based company or that Intel violated the antitrust laws through its sales and marketing activities regarding European customers. In addition, Intergraph made no allegations that Intel conspired with industry members in connection with standard setting activities.[4]

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[3] Intergraph amended its complaint four times during the course of the litigation. Intergraph's final complaint narrowed the number of counts, but most of the underlying state law claims remained. Intel has attached exemplars of the various complaints. If the Court requests all generations of Intergraph's complaints Intel will produce the other generations promptly.

[4] At one point during the parties' patent license discussions, Intergraph asserted that a license offered to it by Intel during the developmental stage of the Accelerated Graphics Port Specification was too broad from

7. On June 17, 1998, Intel answered the complaint, denied the material allegations and brought counterclaims against Intergraph alleging that Intergraph infringed certain Intel patents (eventually Intel asserted seven patents against Intergraph). Intel also brought claims against Intergraph for breach of contract alleging that Intergraph wrongfully withheld Intel confidential information.

B. The Federal Circuit Affirms Summary Judgment Dismissing All Of Intergraph's Antitrust Claims

8. Early on in the litigation, Intergraph moved for a preliminary injunction, arguing that it was likely to succeed on its antitrust claims. In early 1998, the district court granted Intergraph's motion for a Preliminary Injunction. Relying on antitrust theories later rejected by the Federal Circuit, the district court held that Intel was required to treat Intergraph as a "strategic customer in current and future programs" notwithstanding the parties' patent dispute. *See Intergraph Corp. v. Intel Corp.*, 3 F. Supp.2d 1255 (N.D. Ala. 1998), *vacated*, 195 F.3d 1346 (Fed. Cir. 1999).

9. On November 5, 1999, the Federal Circuit reversed and vacated the district court's injunction, concluding that Intergraph did not have a likelihood of succeeding on its antitrust claims. 195 F.3d at 1352. The Federal Circuit held that the parties did not compete in any of the markets claimed to be monopolized by Intel's alleged actions against Intergraph, including the microprocessor market. This lack of a competitive relationship precluded a finding of unlawful abusive conduct towards Intergraph and barred Inter-

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the standpoint of Intergraph as a licensor because it might capture too many Intergraph patents. Although this contention involved an industry specification, Intergraph never accused Intel of "enter[ing] into standard-setting cartels," either during the parties license discussions or in the litigation (*Contrast* AMD App. 3:8-3:9 accusing Intel of entering into such cartels.) Only one Intergraph document request in the litigation specifically referred to AGP or the AGP Specification (*see, e.g.*, Request No. 2 attached to Intergraph's First Request for Admissions) and Intergraph propounded no document requests relating to so-called "standard-setting cartels" or a similar concept.

graph's antitrust complaint. *Id.* at 1359. As an independent ground for reversal, the Federal Circuit held that Intel had no obligation to supply its intellectual property, whether in the form of patents, copyrights or trade secrets. As the Court held: "the antitrust laws do not negate the patentee's right to exclude others from patent property" and "the owner of proprietary information has no obligation to provide it, whether to a competitor, customer or supplier." *Id.* at 1362, 1363. Finally, and wholly apart from the issue of intellectual property, the Federal Circuit held that Intel's cessation of its relations with an adversarial customer that threatened Intel and its customers with litigation did not constitute an antitrust violation. *Id.* at 1358.

10. As detailed more fully below, during the course of the litigation (and particularly following the initial grant of the preliminary injunction) the parties engaged in substantial discovery on the patent claims and counterclaims, as well as the parties' state law claims and Intergraph's antitrust claims. Numerous depositions were taken. Intel made available to Intergraph for inspection approximately 1,435 boxes of documents (totaling approximately 2.75 million pages). After discovery was completed, Intel moved for summary judgment on Intergraph's Section 2 antitrust claims. The main evidence presented by Intergraph in opposition to Intel's motion was the expert report of Professor MacKie-Mason in which he claimed that Intel's withholding of patented technology from Intergraph harmed competition in the relevant antitrust markets.[5]

11. On March 10, 2000, the district court granted Intel's motion for summary judgment. *See Intergraph Corp. v. Intel Corp.*, 88 F. Supp2d 1288 (N.D. Ala. 2000). The District Court ruled that based on the law of the case doctrine, it was bound by the Federal Circuit's decision on the preliminary junction appeal that Intergraph had no cognizable antitrust

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[5] Prior to the close of discovery, Intel moved for summary judgment on Intergraph's Section 1 antitrust claims. Intergraph dismissed those claims with prejudice, without responding to Intel's motion.

claims.[6] On appeal to the Federal Circuit, Intergraph again submitted the entire expert report of Professor MacKie-Mason and argued that "after two years of discovery and rigorous expert economic analysis of the evidence," Intergraph had evidence of harm to competition in microprocessors. Specifically, Intergraph argued that its "expert economist, Professor Jeffrey MacKie-Mason, prepared a comprehensive and thorough expert report explaining how Intel's conduct harmed competition in the microprocessor market."[7] On June 8, 2001, the Federal Circuit rejected Intergraph's arguments and affirmed the District Court's decision granting summary judgment against Intergraph on its antitrust claims, and entered final judgment under Rule 54(b) against Intergraph on those claims. 253 F.3d 695 (Fed. Cir. 2001). At present, only the patent claims and state law claims remain in the case.

C. Intel's Discovery Provided to Intergraph

12. On July 16, 1998, the district court entered a protective order governing the confidentiality of all discovery produced in the case. (See Exhibit 3.) The protective order was entered in the context of a case that principally involved a patent and commercial dispute between companies that were not competitors. The protective order limited access to outside counsel, experts and consultants, and certain in-house counsel at both companies, on a reciprocal basis, that could certify that over the past two years he or she was not

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[6] Specifically, the District Court found that there was an "underlying theme in the Federal Circuit's opinion: that Intergraph and Intel did not compete in the same market, and therefore, Intergraph has no maintenance of monopoly antitrust claim against Intel under Section 2 of the Sherman Act." *Id.* at 1292. Second. as an independent ground for summary judgment, the District Court followed the Federal Circuit's holding that Intel was entitled to withhold its intellectual property free from antitrust liability. This ruling was based on "the Federal Circuit's repeated statements dealing with a patentee's right to exclude others from its intellectual property." *Id.* at 1292.

[7] See Exhibit 2 hereto attaching relevant excerpts from Intergraph's brief on appeal.

involved in competitive decision-making.[8] Under paragraph 3 of the Protective Order, Intergraph was obligated to "show a copy" of the Order to its experts (which would include Professor MacKie-Mason) and to ascertain that he has "either read the order or is completely conversant with its terms, [and] understands that any violation of the Order shall constitute a contempt of Court ... [and that he] has agreed to abide by the terms of this Order." In addition, the Protective Order allowed the parties to mark as confidential sensitive business documents and mandates that "persons obtaining access to 'Confidential' documents pursuant to the terms of the Order may not use such documents or any information therefrom except in the preparation and trial of *this litigation* (including appeals and retrials), and shall not use such information for any other purposes (including business, governmental, commercial, administrative, judicial or personal matters)." (Emphasis supplied.)

13. On June 7, 1999, the district court entered a separate protective order governing non-party discovery. (See Exhibit 3.) The protective order recognized that third party discovery was taken in the FTC case, and provided for coverage of third party confidential material taken in the FTC case under the *Intergraph* protective order. (*Id.* Par. 3.) The order contemplated that there would be substantial third party discovery in the *Intergraph* case, and limited access to such discovery to outside counsel not involved in patent application work for a party, counsel's employees, and experts and consultants who first signed a stipulation to be bound by the order. In-house counsel was not granted access to third party confidential information. (*Id.* Par. 5.)[9] The Order states that in the event another court requests by subpoena third

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[8] The protective order was later amended on April 23, 1999 to extend access to two employees who executed agreements to use the information solely for purposes of the pending litigation, and an additional fifteen employees were granted access to technical documents to facilitate work on the patent case. *Id.*

[9] The Order also allowed access to the district court and authors or recipients of any third party confidential information.

party documents produced in the *Intergraph* case, the subpoenaed party must notify the third party that produced the documents and take any necessary action to protect the third party's confidentiality by filing an appropriate motion with the Alabama court. (*Id.* Par. 8.)

14. On August 12, 1998, the district court entered an order regarding automation of discovery and trial documents. (See Exhibit 4.) Pursuant to the court's order, each party was supposed to electronically code and image documents responsive to the other party's document requests at its own expense and to produce all relevant documents to the other side electronically.[10] Pursuant to the court's order, Intel began the process of imaging and coding the complete set of documents it intended to produce. However, early on in the process Intel recognized that it would simply be prohibitively expensive and time consuming for Intel to complete the imaging and coding project ordered by the court. Intel went back to the court and explained the impossibility of complying with the court's order.[11] The court noted that it understood the difficulties imposed by the order. Intel and Intergraph negotiated a resolution pursuant to which Intel agreed to image and code a subset of documents, focusing on documents from the files of individuals that Intergraph had noticed for deposition in the case and other documents selected by Intergraph.

15. The Court's order required the parties to code the documents electronically utilizing the following fields: Title, Date, Author, Recipient, Carbon Copy Recipient, Physical attachment Range, Type of Document (e.g., agreement, correspondence, technical, etc.) and Bates number. The Order

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[10] Imaging takes a photographic snapshot of a document and creates an electronic image of the document that later is placed on a CD. Imaging allows you to print an exact copy of the document from the CD.

[11] There was substantial briefing of the issue whether the court could require Intel to electronically image and code the documents in light of the expense, including a mandamus application to the Federal Circuit, which was denied.

also required the parities to produce the documents electronically.

16. Over the course of the litigation, Intergraph served approximately 16 separate document requests on Intel containing approximately 603 specific requests for production. Attached hereto as Exhibit 5 are copies of those document requests.[12]

17. Intel searched the files of approximately 599 individuals in response to the various document requests in the litigation, of which only five resided in Europe.

18. Most of the Intel employees searched had relevant documents responsive to multiple categories in Intergraph's document requests. By way of example, Intel searched the files of several of Intel's senior executives. Many of these executives had information relating to the specific business relationship between Intel and Intergraph, Intel's decision-making policies and procedures with regard to the Intergraph relationship, Intel's chipset, motherboard and graphics sub-systems (now discontinued) businesses, and general competitive analysis in each of the relevant product lines. Some such individuals also had documents discussing the accused Intel products that Intergraph alleged infringed its patents, and documents relating to the technologies embodied in the Intel patents relevant to Intel's patent infringement counterclaims against Intergraph.

19. Intel also searched the files of numerous employees that had direct dealings with Intergraph. Many of the documents from the files of these individuals dealt with the parties' direct business relationship. Many such employees also had copies of documents regarding various other issues in the case. Intel also searched the files of numerous engineers to respond to technical requests relating to the patent and warranty issues in the case. Although most of the documents from the files of these individuals related to technical issues,

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[12] Although the last request Intergraph served was numbered 625, Intergraph misnumbered the requests.

some such individuals possessed business-oriented documents relating to the various products at issue in the Intergraph case.

20. Virtually all of the documents that Intel produced to Intergraph were produced as they were kept in the usual course of business. Such documents were produced from the files of individual witnesses without relation to any specific document request propounded by Intergraph. In other words, the documents that Intel produced to Intergraph were not organized to correspond with the categories in any document request.[13]

21. The document requests Intergraph served on Intel sought documents on a wide range of issues, from the parties' patent claims and counterclaims, to the antitrust issues, to the various state law claims. As can be seen from the requests themselves (See Exhibit 5), approximately 60% of the requests sought documents related solely to the patent disputes between the two companies. A large portion of the remaining requests sought documents regarding the parties' direct business relationship, the specific disputes between the two companies, and products other than microprocessors.

22. For example, Request Nos. 56-67 sought all documents relating to the Intergraph patents in suit. Requests Nos. 430-509 sought, *inter alia*, file histories of the patents in suit (Request 430), communications by the inventors about the patents (Request 432), invention disclosures of the patents (Request 436), problems solved by inventions (Request 438), and all patents reviewed in connection with prosecution of patents in suit (Request 446). *See also* Request Nos. 420-428, 546-564 concerning Intel's counterclaim patents in suit.

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[13] Federal Rule of Civil Procedure 34 allowed Intel to produce the documents either as maintained in the regular course of business or by categories corresponding to specific requests.

23. Certain of the document requests sought highly confidential information concerning the inner-workings of Intel's microprocessor products. These documents were relevant only because Intergraph accused such Intel products of infringing Intergraph patents. *See, e.g.*, Request No. 278 seeking "all documents concerning the operation and/or structure of the Instruction Cache of the Pentium Microprocessor"; Request No. 287 seeking "all documents concerning the operation and/or structure of the data cache of the Xeon microprocessor"; Request No. 296 seeking "all documents concerning the operation and structure of the Writethrough Caching Policy of the Celeron Microprocessor"; Request No. 308 seeking "all documents concerning the flow or transfer of data into, out of, and/or through Fetch/Decode Unit, instruction pipelines, buffers, FIFO, and/or registers in advance of the first instruction decode stage of the Celeron Microprocessor"; Request No. 319 seeking "all documents Concerning Bus-Snooping operations and capabilities of the Xeon Microprocessor or any system that includes at least one Xeon Microprocessor"; Request No. 325 seeking "all documents concerning the PCI Write Cycle Snoop in the Celeron II Microprocessor or any system that includes at least one Celeron II Microprocessor."

24. Many document requests specifically sought information concerning the particular dealings between Intel and Intergraph. *See, e.g.*, Request No. 91 seeking "all documents concerning Intergraph or Intergraph products"; Request No. 215 seeking "all documents concerning Intel's decision in 1997 purporting to terminate non-disclosure agreements with Intergraph and requesting return of confidential information"; Request No. 218 seeking all documents concerning Intel's decision in 1997 refusing to permit Tectronix to supply test equipment to Intergraph; Request No. 217 seeking all documents relating to Intel's alleged decision not to assist Intergraph with the PIIX 4 chip; Request No. 221 seeking all documents relating to communications between Intel and Intergraph concerning Intergraph's entry into the digital media market; Request No. 250 seeking all documents concerning Intel's provision of motherboard assistance to Inter-

graph, Request No. 267 seeking documents concerning attempts to remedy bugs in Intel products sold to Intergraph; Request No. 272 seeking documents concerning warranty representations of Intel on the quality and fitness of Intel products.

25. Many other document requests related to products other than microprocessors. *See, e.g.*, Request Nos. 128 and 187-189, 536 asking with respect to motherboards for all documents relating to Intel's costs, margins, sales, prices, profitability and market share; Request Nos. 178-81 asking with respect to workstations for all documents concerning competition in workstations including Intel's plans or strategies, market share information and the relative strength or weakness of various companies; Request Nos. 182-185 and 539 seeking with respect to graphics subsystems systems all documents concerning competition including Intel's plans or strategies, market share information and the relative strength or weakness of various companies; Request No. 537 seeking all documents relating to each chipset sold by Intel including total sales, gross and net profits, costs of goods, general and administrative expenses, sales and marketing expenses, fixed unit production cost, variable costs, average cost and average pre-tax profit.

26. Of the 603 requests, 342 related to the patent issues in the case.[14] Only about 100 requests related to non-patent microprocessors issues, and many of these requests related to issues that were very different from AMD's allegations.[15] Approximately 81 requests related to products and technologies other than microprocessors. Approximately 20 requests related to patent licensing issues and royalties. The remaining requests related to the state law issues, the par-

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[14] *See, e.g.*, Request Nos. 1-68. 81-85, 174, 195-202, 278-329, 358-361, 386-429, 430-509, 510-514, 533-540, 541-543, 546-565, 571-614.

[15] See, e.g., Request Nos. 358-61 asking for documents sufficient to evidence all fixed asset or other capital expenditures relating to the manufacture of Intel processors together with related depreciation and asset disposition schedules.

ties' specific dealings, or other general requests for information.

27. Many documents produced to Intergraph came from Intel productions to the Federal Trade Commission. Beginning in 1997, the FTC looked into Intel's decision in 1997 not to supply three companies, including Intergraph, with Intel patented product samples and information after the companies sued or threatened to sue Intel and its customers with patent litigation. Intergraph's allegations in this regard were substantially the same as those examined by the FTC. The production of the FTC documents to Intergraph occurred many months before the Federal Circuit affirmed the legality of Intel's conduct. The Intergraph production also included, among other things, documents produced to the FTC in connection with Intel's acquisition of two graphics chip companies and a semiconductor manufacturing facility.

28. Intel also collected a large number of documents in direct response to Intergraph's requests. Overall, Intel made available to Intergraph for inspection approximately 1,435 boxes of documents totaling 2.75 million pages. Intergraph selected a substantial number of documents for copying (approximately 500,000 pages). Pursuant to an agreement of the parties, Intel delivered to IKON, a third party vendor of copying services, the documents Intergraph selected for copying from the larger set of documents made available for inspection. IKON handled the imaging and coding of the documents. Intel made deliveries of documents to IKON in multiple shipments. IKON presumably imaged the documents in the order in which they were received from Intel. IKON did nothing to collate the documents in any way other than to maintain them in the order as received from Intel. In particular, nothing was done to organize the documents to correspond with the categories in any Intergraph document request. The documents are thus imaged on the CDs as they were kept in the normal course of business.

29. There was a large volume of third party discovery taken in the *Intergraph* case relating to the patent, antitrust and state law issues. The following third parties received subpoenas in the *Intergraph* litigation: 3DFX Interactive,

Inc.; 3DLABS, Inc.; Acer Laboratories Inc. [Taiwan]; Acer Laboratories Inc., USA; Advanced Micro Devices. Inc.; Amdahl; American Megatrends, Inc.; Aopen America, Inc.; Apple Computer; Alpha Processor, Inc.; Asustek; Avance Logic; Atmel; ATI Technologies; Austek Microsystems Ltd.; Blur Studios, Inc.; Business Wire, Inc.; Ceita, Inc.; Centaur Technology, Inc.; Centropolis Effects, Inc.; Cirus Logic, Inc.; Compaq Computer Corp.; Convergent Technology, Inc.; Cyrix Corp.; Dell Computer Corp.; Diamond Multimedia Systems, Inc.; Digital Equipment Corp.; Elitegroup Computer Systems, Inc.; Encore Real Time Computing, Inc.; Evans & Sutherland Corp.; First International Computer of America; Fujitsu; Hal Computer Systems, Inc.; Hewlett-Packard; Hitachi American, LTD.; IBM Corp.; Integrated Device Technology, Inc.; Integrated Technology Express, Inc. [Taiwan]; Ispat Inland Management Association; Matrox; Metaflow Technologies, Inc.; Microstar International; Mitac USA, Inc.; Motorola; MSI Computer Corp.; Mylex Corp.; National Semiconductor; Inc.; NEC Electronics, Inc.; NStor Corp., Inc.; Number Nine Visual Technology Corp.; Nvidia Corp.; Phoenix Corp.; Phoenix Technology, Ltd.; Platinum Technologies; Rainbow Studios; Razorfish, Inc.; Rendition, Inc.; Rise Technologies Co.; S3 Inc.; Samsung Semiconductors, Inc.; Schulmberger Ltd.; SGI; Siemens Nixdorf Information Systems, Inc.; Silicon Graphics Systems Corp.; Silicon Integrated Systems [Taiwan); Silicon Integrated Systems Corp.; Silicon Spice; Soyo Computer, Inc.: STMicroelectronics, Inc.; Sun Microsystems, Inc.; Techfarm, Inc.; Texas Instruments; Tidalwave Microtech Inc. [Taiwan]; Transmeta Corp.; Trident Microsystems, Inc.; United Microelectronics Corp. [Taiwan]; Universal Scientific Industrial Co. Ltd.; Via Technologies. Inc.; Xerox Corp.; Xyratex International Ltd.; and Zilog, Inc. In addition, several third parties produced documents pursuant to subpoenas in the FTC case and these documents were made available to Intergraph under the coverage of the Intergraph non-party protective order. All together, more than 114,000 pages of documents were obtained from third parties in the *Intergraph* case.

30. Intel has no database of the documents contained on the CD's produced to Intergraph that organizes or categorizes the documents according to the categories in any specific Intergraph document request to Intel. Intel has never sought to create a subject matter index of the documents on the CDs.[16] As a result, there is no way, short of a document by document review, that Intel can cull from the documents on the CDs the subset of documents that might somehow be relevant to AMD's allegations of European antitrust violations. To conduct such a document by document review, Intel would have to expend substantial time and resources.

31. During the course of the litigation, Intergraph deposed sixty Intel employees. and received an additional volume of deposition transcripts of Intel employees from the FTC case. A substantial part of the testimony was not directed to the types of microprocessor issues alleged by AID. Forty-five third parties were also deposed in the litigation. In addition, ten experts were deposed. Of these, none was involved in the antitrust issues; all of the experts deposed were retained on the patent issues in the case.

32. I am also counsel of record for Intel in a patent infringement case Intel filed against VIA Technologies, Inc. in the Northern District of California. (Case No. C99-03062 WHA (JL).) In that case, Intel subpoenaed AMD for certain records relevant to the patent infringement issues in the case. AMD sought to quash that subpoena, and argued, among other things, that the governing protective order in that case was inadequate to protect AMD's documents because Intel's outside counsel might use the documents in connection with the EC investigation.[17] (Exhibit 6 at 10:12 -

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[16] Intel did create an index for those documents produced to the FTC that identified the specifications in the FTC's document requests to which Intel documents were responsive. This index cannot be used to cull out the subject matter of documents on the CDs in the Intergraph case, however, because a large percentage of the documents Intergraph selected were not part of the earlier FTC production.

[17] The protective order in question barred disclosure of any confidential documents or information to in-house counsel.

10:24). AMD asserted that policing outside counsel's compliance with the protective order "would be close to impossible." *Id.* at 10:24.

I declare under penalty of perjury that the foregoing is true and correct. Executed on October 29, 2001.

/s/_____
Darren B. Bernhard

PROOF OF SERVICE

I, the undersigned, am employed in the County of Alameda, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 1530 Page Mill Road, Palo Alto, California, 94304, in said County and State; I am employed in the office of Shelley K. Mack, a member of the bar of this Court, and at his direction, on October 29, 2001, I served the within: Declaration of Darren B. Bernhard in Support of Intel Corporation's Opposition to Advanced Micro Devices' Application for Order, by placing a true copy thereof in an envelope addressed to each of the persons named below at the address shown:

Patrick Lynch Esq.
David I. Hurwitz, Esq. — Attorneys for Plaintiff
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400 South Hope Steret
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212 430-6000
213 430-6407

☒ BY MAIL: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ BY FACSIMILE: From facsimile machine telephone number (650) 849-5333, on the above-mentioned date, I served a full and complete copy of the above referenced document[s] by facsimile transmission to the person[s] at the number[s] indicated without error.

☐ BY PERSONAL SERVICE: I placed a true copy in a sealed envelope addressed to each person[s] named at the

address[es] shown and giving same to a messenger for personal delivery before 5:00 p.m. on the above-mentioned date.

☐ BY FEDERAL EXPRESS, PRIORITY OVERNIGHT NEXT DAY AIR: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for delivery by Federal Express, Priority Overnight. Pursuant to that practice, envelopes placed for collection at designated locations during designated hours are delivered to Federal Express with a fully completed airbill, under which all delivery charges are paid by Gibson, Dunn & Crutcher LLP, that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that the foregoing document(s) were printed on recycled paper. Executed on October 29, 2001, at Palo Alto, California.

/s/
Janel M. Chrestenson

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INTEL CORPORATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ADVANCED MICRO DEVICES, INC., Applicant, v. INTEL CORPORATION Respondent	CASE NO. 01-7033 MISC WAI- **DECLARATION OF DR. NIGEL PARR IN SUPPORT OF INTEL CORPORATION'S OPPOSITION TO ADVANCED MICRO DEVICES' APPLICATION FOR ORDER** Date: November 19, 2001 Time: 2:00 p.m. Courtroom: Courtroom of the Honorable William A. Ingram

1. I am a partner in the law firm of Ashurst Morris Crisp, Broadwalk House, 5 Appold Street, London EC2A

2HA, United Kingdom. I have been a partner with the firm since 1994 and currently serve as head of the firm's competition and trade practice group. Following my LLB and LLM degrees in law, I was awarded a doctorate in European Community law in 1986 (my thesis subject was the legal reasoning of the European Court of Justice). Prior to entering private practice I taught European Community law at the University of Exeter, UK. I am joint author of the leading book on UK merger control law and practice, and regularly contribute to leading reviews on competition law. I have written many articles on competition law and presented numerous papers at conferences on competition law, most recently in June 2001 to the Regulatory Policy Institute at the University of Oxford, which was attended by current and former senior personnel from the US and EC competition enforcement agencies. I am a committee member of the UK Law Society's European Group and am listed as an expert in EC competition law in the publications 'Legal 500 – Who's Who in the Law', 'Chambers' Guide to the Legal Profession', 'Chambers Global, The World's Leading Lawyers' and 'Global Competition's An International Who's Who of Competition Lawyers.'

2. I am a solicitor of the Supreme Court of England and Wales and, amongst other things, I am qualified to practise before the European Commission, the European Court of First Instance and the European Court of Justice, as well as the UK Office of Fair Trading and the Competition Commission (the UK regulatory bodies in relation to competition law). I have represented a variety of clients before the European Commission in a broad range of competition law matters. I am presently counsel for Intel Corporation in connection with the Commission's current preliminary inquiry into the complaint lodged by Advanced Micro Devices, Inc. ('AMD') with the Commission against Intel. I base this Declaration upon personal knowledge of the matters set forth therein.

In this Declaration I will address the following:

(a) a basic background description of the European Union (paragraphs 3 to 4);

(b) an outline of the structure and functions of the European Commission, and the courts in which disputes with the Commission are adjudicated (the European Court of Justice and the Court of First Instance) (paragraphs 5 to 9);

(c) an explanation of the procedure and powers of the Commission in relation to competition law investigations under Articles 81 and/or 82, concluding with a summary of the non-adversarial (and non-adjudicatory) nature of the Commission's procedure and of the status of a complainant, which is not like a plaintiff or claimant in adjudicatory or adversarial proceedings (paragraphs 10 to 22);

(d) a description of the nature and status of the current activity of the Commission regarding AMD's complaint, explaining Intel's full co-operation with all information requests made by the Commission to date and the additional comment and information which it has voluntarily provided (paragraphs 23 to 28);

(e) an explanation of why the Commission is not an adjudicatory body, noting the case law of the European and English courts and the Commission's own statements regarding the proper characterisation of its procedures, which are distinct from litigation proceedings (paragraphs 29 to 33);

(f) an explanation of the paramount policy of confidential treatment of information in European competition cases and the absolute prohibition under EC law of the disclosure of the 'business secrets' of an investigatee to a complainant (particularly a competitor) (paragraphs 34 to 36); and

(g) a summary of the reasons why the Commission possesses neither adjudicatory authority nor uses adjudicatory procedures that are akin to the quasi-adjudicatory procedures of the U.S. Federal Trade Commission in certain matters, as described in the Declaration of James F. Rill (paragraphs 37 to 44).

The European Union

3. The European Union is comprised of 15 nations: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain, Sweden and the UK, referred to as the 'Member States.' The term 'European Union' covers all aspects of the economic, financial, social and political agreements between the Member States. A core aspect of the European Union is the European Economic Community, which was created on 1 January 1958 by the Treaty of Rome (since amended and now referred to as the EC Treaty) and deals with the economic arrangements between the Member States such as competition/anti-trust, internal trade and the free movement of goods, services, persons and capital.

4. There are a number of institutions of the European Union, including the Commission of the European Communities ('the Commission'), the Court of First Instance ('CFI') and the European Court of Justice ('ECJ'). These institutions are independent of the Member States and exist under European Community ('EC') law. The EC legal system including its court system exists independently of the domestic legal systems of each Member State, although EC law is effectively part of the domestic law of each Member State and EC competition law can be applied directly by the domestic courts of the Member States.

The structure and function of the Commission

5. The Commission was established in 1958 under the Treaty of Rome. It has described its role as comprising three main functions:

> Because of its right of initiative, the Commission is charged with making proposals for all new legislation. . . . In its second function, the Commission acts as the guardian of the EU treaties to ensure that EU legislation is applied correctly by the Member States and that all citizens and participants in the single market can benefit from the level playing field that has been created. . . . In its third function,

> the Commission is the executive body of the Union responsible for implementing and managing policy.

('The role of the Commission' at http://europa.eu.int/comm/role_en.htm#1 attached hereto as App. 1[18]).

6. Decisions of the Commission are taken by the 20 Commissioners, who are appointed by the Member States. Member States typically appoint senior politicians to the Commission. However, once appointed, the Commissioners act independently of the Member States.

7. Articles 81 and 82 of the EC Treaty (attached hereto as App. 2) prohibit agreements which have as their object or effect the prevention, restriction or distortion of competition (Art. 81) and the abuse of a dominant position (Art. 82), in each case in so far as the agreement or conduct affects trade between Member States. Article 85 of the EC Treaty (App. 2) allocates responsibility for the enforcement of Articles 81 and 82 to the Commission. The various areas of responsibility of the Commission are divided into Directorates General (or 'DGs'). Each of these DGs has the responsibility for specific policy areas, such as economic and monetary policy, trade, budget, environment, taxation, transport and energy, agriculture, etc. One of these DGs, the Competition Directorate General (commonly referred to as DG COMP), is charged with responsibility for the enforcement of Articles 81 and 82. DG COMP is empowered to investigate companies for breaches of Articles 81 and 82 and to order companies that it charges with such breaches to end agreements or conduct that breach these Articles, pursuant to a process discussed in paragraphs 10 to 22 below.

8. Certain of the Commission's enforcement actions are subject to judicial review (if such a review is launched) under Article 230 of the EC Treaty (attached hereto as App. 3). Such reviews are made to the Court of First Instance ('CFI'), which acts as the court of original jurisdiction for

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[18] Materials cited in this declaration are reproduced in the Appendices to this declaration.

direct actions under EC law (Art. 225(1) EC Treaty, attached hereto as App. 3). The CFI consists of 15 members, appointed from the senior judiciary of the Member States. Any legal person which is affected directly and individually by a Commission decision that is subject to review, which in some circumstances can include certain third parties, may seek review by the CFI. (Art. 230(4) EC Treaty, App. 3).

9. The European Court of Justice ('ECJ') is the ultimate reviewing court in actions under EC law including matters of EC competition law. The ECJ consists of 15 judges, assisted by eight advocates general who are also members of the Court (Arts. 221 and 222 EC Treaty, App. 3). The role of the advocates general is to deliver to open court fully reasoned opinions on legal and policy issues before the Court to ensure that the principles of EC law are observed, and to recommend the final ruling of the ECJ. Their opinions are an influential source of law which are cited in submissions to the ECJ, CFI and national courts of the Member States on points of EC law.

The procedure and powers of the Commission in relation to competition law investigations under Articles 81 and/or 82

10. The principal legislative measures setting out the procedural rules for the implementation of Articles 81 and 82 are the First Regulation Implementing Articles 81 and 82 of the Treaty, (Council Regulation 17/62/EEC OJ 1962 L 13/204) ('Reg. 17') and Commission Regulation (EC) No 2842/98 (OJ 1998 L 354/18) ('Reg. 2842/98').[19] (These regulations are appended to this Declaration as App.s. 4 and 5).

11. The Commission has the power to investigate the conduct of companies, referred to in Articles 81 and 82 (App.

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[19] Articles 81 and 82 of the EC Treaty had been numbered as Articles 85 and 86 prior to the amendment of the EC Treaty by the Treaty of Amsterdam in 1997. Certain of the cited documents have not been amended to reflect the new numbering. For convenience, they are referred to in this Declaration by reference to the new Article numbers.

2) as 'undertakings', following notifications to the Commission by parties to an agreement, complaints by third parties, or at the Commission's own initiative. DG COMP's practice is to conduct initial inquiries to gather material about the market concerned and the agreement or conduct in question before deciding whether to commence a formal investigation. This fact finding stage constitutes a preliminary phase to enable the Commission to evaluate whether a breach of Article 81 or 82 may have occurred. If the Commission has reason to believe a breach has occurred, it may launch a formal investigation, although it is under no obligation to do so and a complainant cannot require the Commission to investigate a complaint (Case T-24/90 *Automec -v- Commission* [1992] ECR II-2223 at ¶¶ 75 and 76, attached hereto as App. 6).

12. DG COMP's inquiries and investigations are carried out by case officers, who are career civil servants whose job is to conduct inquiries and investigations and prepare draft final decisions regarding enforcement of Articles 81 and 82 (App. 2) for consideration and adoption by the Commission.

13. In conducting its inquiries, as well as its formal investigation, the Commission has extensive powers to gather the necessary information itself. (Case 53/85 *AKZO Chemie BV -v- Commission* [1987] 1 CMLR 231, Opinion of AG Lenz at page 248, attached hereto as App. 7) ('in competition proceedings the Commission has powerful means of coercion at its disposal in order to carry out its investigation'). The Commission is empowered to conduct 'dawn raids,' or on-site investigations at the premises of companies, without prior notice. (Reg. 17, Art. 14, App. 4). It is also empowered to 'obtain all necessary information' from 'undertakings and associations of undertakings' (Reg. 17, Art. 11(1), App. 4), which can comprise both documents and written answers to questions. The Commission begins the information gathering process by issuing a request for information under Article 11(3) of Reg. 17 (App. 4), which is commonly referred to as an 'Article 11 request.' Where a company fails to provide the requested information, the Commission will require the company concerned to provide the information by a specific

date. (Reg. 17, Art. 11(5), App. 4). The Commission is empowered to sanction companies that fail to comply with Article 11(5) decisions with fines or 'periodic penalty payments' for continuing failures to provide information. (Reg. 17, Arts. 15(l)(b), 16(l)(c), App. 4).

14. Accordingly, although the input of complainants is welcomed by DG COMP where it contributes to the fact-gathering and verification process, in no way could the Commission be said to be reliant upon such input. In particular, it is not the practice of the Commission to request a company to provide documents that would have to be obtained in turn from a third party since the Commission can request the documents from the relevant company directly using an Article 11 request if necessary. I am not aware of any case where the Commission has relied on a complainant to provide it with the business records of the investigatee. In this respect, it is important to note that there are no limits on the number of Article 11 requests that the Commission may issue in a single inquiry to the investigatee, any complainant, or third parties. It is quite common for the Commission to issue multiple Article 11 requests to particular companies during a pre-investigation inquiry or a formal investigation (for example to verify arguments submitted by the investigatee in response to the statement of objections (discussed below)).

15. Throughout its preliminary inquiries and during the formal investigation the Commission is required to respect the strict confidentiality of 'business secrets' which it has received from all parties – including the investigatee and the complainant. (Art. 20, Reg. 17, App. 4 and *AKZO, supra*, App. 7). A company that provides confidential information or documents to the Commission has the right to request that the Commission treat them as 'business secrets' to prevent third parties from obtaining strategic information on their essential interests and on the operation or development of their business'. (Commission notice on the internal rules of procedure for processing requests for access to the file in cases pursuant to Articles [81] and [82] of the EC Treaty, Articles 65 and 66 of the ECSC Treaty and Council

Regulation (EEC) 4064/89 (OJ 1997 C 23/3), Section 1A(1) paragraphs 1 and 2 (referred to herein as 'Commission's notice on access to the file'), attached hereto as App 81. (See also *AKZO*, *supra*, at ¶ 28, App. 7) ('[a] third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets').

16. Where the Commission has reason to believe that there has been a breach of Article 81 and/or 82, the Commission will commence a formal investigation by issuing a statement of objections ('the SO'). The SO sets out the Commission's understanding of the facts and its legal reasoning, and has annexed to it the documentary material on which the Commission wishes to rely. The investigatee has the right (but no obligation) to reply in writing to the SO (Reg. 2842/98, Art. 4(1), App. 5), and to provide factual support as well as legal argument and expert economic evidence for its position. The Commission will also provide a copy of the SO to a complainant, although this must be a non-confidential version of the SO, with business secrets belonging to the investigatee (or other third parties) having been redacted. (Art. 7, Reg. 2842/98, App. 5). The Commission may not disclose the business secrets of the investigatee to a complainant under any circumstances. (See also *AKZO*, *supra*, at ¶ 28, App. 7, and paragraph 34 below). The complainant has a right to make a written response to the SO (Art. 7, Reg. 2842/98, App. 5).

17. After an SO is issued, the investigatee will be given access to all documents which have been gathered by the DG COMP case officers except for the business secrets of other companies, internal Commission documents (e.g. memoranda between case officers and internal views) and other confidential information (e.g. commissioned market studies). (Commission's notice on access to the file, section I ¶ 1, App 8). Access is provided so that the investigatee can properly respond to the SO having seen all of the documents making up the Commission's file. The complainant has no right of access to the Commission's files unless its complaint has been formally rejected, in which case it will have access to those documents on which the Commission has relied in re-

jecting the complaint. (Commission's notice on access to the file, section II D(1) ¶ 2, App. 8). Even at that point, however, the complainant must not be given access to documents containing the investigatee's business secrets, as the ECJ has held in *AKZO* (*supra*, at ¶ 28, App. 7), and as the Commission has confirmed more recently in its Notice on Access to the File (section II D(1) ¶ 2, App. 8).

18. If an SO has been issued, the investigatee has the right to request an opportunity to explain its position to DG COMP orally (Art. 5, Reg. 2842/98, App. 5). Under Article 12(3) of Reg. 2842/98, oral hearings are not public (Art. 12(3), Reg. 2842/98, App. 5). The Commission has the discretion to allow a complainant and/or certain third parties to participate in the oral hearing if they so request. (Arts. 8 and 9(2) and (3), Reg. 2842/98, App. 5). The hearing is organised by the hearing officer who is responsible for supervising its conduct (Art. 10, Reg. 2842/98, App. 5), and whose key role under the current recently amended procedure is to ensure that various rights are respected. (Art. 1, Commission Decision of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings (OJ 2001 L 162/21), attached hereto as App. 9). If attendees are heard together rather than separately, the Commission must have regard to the need to protect business secrets (Art. 12(3), Reg. 2842/98, App. 5).

19. The hearing officer is responsible for ensuring that the rights of confidentiality are respected and in practice this means excluding attendees from those parts of the hearing in which the investigatee's or other attendees' business secrets are discussed. (Art. 12(3), Commission decision of 23 May 2001 on the terms of reference of hearing officers, App. 9). Whilst the hearing officer is responsible for a number of case management decisions as regards the conduct of the investigation in order to ensure that procedural rights are respected, he or she does not exercise any decisional authority in relation to the substantive matters under investigation. For example, the hearing officer's report on the oral hearing is not a ruling on the issues, but covers 'procedural issues, including disclosure of documents and access to the

file, time limits for replying to the statement of objections and the proper conduct of the oral hearing' (Art. 13(1), Commission decision of 23 May 2001 on the terms of reference of hearing officers, App. 9). The report is typically a short statement that the various procedural requirements have been complied with.

20. Following the filing of the investigatee's reply and the oral hearing, DG COMP's investigating case officers prepare a draft decision for the Commissioner in charge of DG COMP. If the Commission intends to clear or exempt the agreement or conduct in question, DG COMP must publish a notice setting out any negotiated conditions for the clearance and inviting comment from any third party (including a complainant). (Art. 19(3), Reg. 17, App. 4). Following consultation with an advisory committee comprising representatives of the Member States, the draft is submitted to the Commissioner in charge of DG COMP for approval, and subsequently becomes effective upon approval by the Commission acting as a collegiate body. Where the Commission believes that there has been a breach of Articles 81 or 82, the decision will usually require the respondent to bring an end to the agreement or conduct in question (Art. 3, Reg. 17, App. 4) and may impose fines and periodic penalties. (Arts. 15 and 16, Reg. 17, App. 4).

21. It is important to recognise several important attributes of the Commission's process:

(a) at all stages the Commission retains the initiative in gathering facts and documents and in deciding whether to take its inquiries further;

(b) the Commission has extensive powers under Articles 11 and 14 of Reg. 17 (App. 4), to gather information and documents and does not rely on the complainant to act as its source of documents;

(c) the process does not provide for taking evidence or testimony under oath at any stage of the process, including any oral hearing;

(d) whilst the Commission can compel the provision of documents and written answers to its questions by busi-

nesses under Article 11 and actively seek them out under Article 14 of Reg. 17 (App. 4), it has no ability to compel companies (including the complainant) to require specific employees with personal knowledge of any disputed matter of fact to participate in any hearing or to submit to interviews, nor can it directly compel the individuals to do so;

(e) As to those persons who participate in a hearing, there is no process of cross examination. The DG COMP case officers may ask questions of the participants at the oral hearing, and DG COMP may seek to verify information provided by a company by asking questions to other companies that are present at the hearing, or subsequently via written questions but they are not required to do so;

(f) there is no process akin to discovery. Where a formal investigation is launched, the investigatee alone has a right of access to the Commission's file but no right to view the facts and documents in the possession of a complainant or any other third party, no matter how relevant. Neither the investigatee nor any other person may seek documents or other information from another person;

(g) there are no rules of pleading; submissions are drafted in such form as the companies choose. There is no requirement that the Commission share submissions from one person with another person, including the investigatee, other than in the limited context of the process of access to the Commission's file described above;

(h) the Commission does not have any rules of evidence applicable to its investigations, including oral hearings;

(i) the Commission does not make adjudications of the rights of litigants; it investigates and takes enforcement decisions in relation to the investigatee;

(j) there is no separation of functions within the Commission between investigator, prosecutor and ultimate decision maker; the Commission does not employ judges or any other independent person to decide disputes between its investigating case officers and investigatees, and the investigating case officers in fact prepare the Commission's decision.

22. As regards the position of a complainant in the Commission's procedures, a complainant is simply a third party or bystander to the Commission's investigation (albeit one with particular rights), and is not like a plaintiff or claimant in court proceedings:

(a) the ECJ's Advocate General Lenz stated 'The complainant is limited to a role which corresponds to the position, under criminal procedure, of a person who reports a matter to the authorities'. (*AKZO*, *supra*, at page 248, App. 7.) In fact, complaints are only one of three ways in which an investigation by DG COMP might commence;

(b) the ECJ has held that complainants have no entitlement to be involved in the discussions which may take place between an investigatee and the Commission to reach an acceptable position which is not in breach of EC competition law, holding that the right of the investigatee to discuss matters with the Commission in this way 'would be imperilled if the complainants were to attend the negotiations or be kept informed of the progress made in order to submit their observations on the proposals put forward by one party or the other.' (Cases 142 and 156/84 *British American Tobacco and Reynolds -v- Commission* [1987] CMLR 4487 at ¶ 24, attached hereto as App. 10).

(c) a complainant has no right to require the Commission to launch a formal investigation or to reach a decision as to whether the complained of agreement or conduct constitutes a breach of Articles 81 and/or 82 (*Automec*, *supra*, at ¶ 75 and 76, App. 6);

(d) a complainant is under no general obligation to provide documents or other information to the Commission: it would only have such an obligation if it received an Article 11 request, and then only as regards the subject matter of the request;

(e) I am not aware of any case where the Commission has relied on a complainant to provide it with the business records of the investigatee, as it has extensive information gathering powers of its own;

(f) where an investigation is commenced by the issuance of an SO, a complainant has no formal rights to any documents or information except the right to receive a copy of the non-confidential version of the SO. It has no rights of access to the Commission s file;

(g) where an investigation is not commenced or is terminated and a complaint has therefore been formally rejected, a complainant acquires only limited rights of access to the Commission's file, which does not include access to the investigatee's confidential business records;

(h) at all times the Commission is under a strict obligation not to provide any business secrets of the investigatee (or third parties) to the complainant.

The nature and status of the current Commission activity regarding AMD's complaint

23. On or about 23 October 2000, AMD submitted a complaint to the Commission regarding Intel's conduct. On or about 18 January 2001, the staff of DG COMP advised Intel of the complaint's filing and sent an Article 11 request to Intel. The Article 11 request asked Intel to provide comprehensive responses to 30 detailed written questions and to provide DG COMP with various types of documents. The Commission did not provide Intel with a copy of AMD's complaint or identify AMD's specific allegations at that time, but provided a 10-line summary of the nature of the complaint in its covering letter, and brief summaries of AMD's claims (typically consisting of two or three lines) in the preambles to the Article 11 questions themselves.

24. On 28 February 2001, Intel provided the Commission with a 91-page reply that fully answered the Commission's written questions, and supplied to the Commission documents supporting the factual statements in that reply. Intel could not address AMD's specific allegations in that reply because at that time it had not received a copy of AMD's complaint. The Commission subsequently asked Intel to redact confidential information from this reply to enable the Commission to supply the redacted copy to AMD. Intel provided this redacted 'non-confidential' version on or

about 20 April 2001 and understands that the reply has been provided to AMD.

25. On or about 1 June 2001, Intel received from the Commission for the first time a redacted non-confidential copy of AMD's 152-page complaint. The redacted copy did not disclose the identities of the lawyers and law firms representing AMD. The redacted complaint made more specific allegations than could be discerned from the summary in the Commission's Article 11 request. In particular, the complaint alleged specific conduct in relation to specific companies and organisations that could not be discerned from the Article 11 request. Most of the allegations in AMD's complaint, and all of AMD's specific allegations of conduct vis-à-vis particular third parties, thus only became known to Intel and its counsel after the receipt of the complaint on or about 1 June 2001.

26. Intel provided to the Commission a detailed 129-page response to the complaint on or about 15 August 2001, in which it addressed and rebutted AMD's allegations. The response was accompanied by hundreds of pages of exhibits that substantiated the factual statements made in the response. Intel is currently working on creating a non-confidential version of this response from which its confidential business information has been redacted so that DG COMP staff may if they wish provide a copy to AMD (as noted above, this is at the Commission's discretion).

27. Intel has cooperated fully with the DG COMP staff and has responded promptly and fully to all of its inquiries. Since Intel's submission of its response to AMD's complaint, the Commission has not made any further Article 11 requests to Intel. Indeed, the only Article 11 request from the Commission in relation to AMD's complaint was the original request to which Intel replied on or about 28 February 2001. No statement of objections has been issued and the Commission's process remains at the stage of preliminary inquiries.

28. The great bulk of AMD's specific allegations regarding sales and marketing conduct which are the subject matter of its complaint (and which are summarised in AMD's

Application) involved Intel's relations with customers in Europe. All of the Commission's questions in its Article 11 request to Intel regarding sales and marketing conduct asked Intel to address marketing practices vis-à-vis 'OEMs and retailers within the EEA,' referring to the European Economic Area that includes the European Union and certain other European states. Both AMD's allegations and the Commission's questions regarding specification development groups relate to the United States.

The EC Commission is not an adjudicatory body

29. The administrative nature of DG COMP's procedure under Articles 81 and 82 has been summarised above (paragraphs 10 to 22). The nature of these procedures has been considered by the Commission itself, the ECJ and the English courts. The Commission has stated that its 'procedure relating to restrictive practices and abuse of a dominant position is administrative and not judicial; it must not be turned into a trial.' (11th Report on Competition Policy (1981) at ¶ 27, attached hereto as App. 11). The Commission has also emphasised that it (and the Member State's national competition authorities), 'do not set out to decide disputes between parties, but rather to guarantee the maintenance of a system ensuring that competition is not distorted.' (White Paper on modernisation of the rules implementing Articles [81] and [82] of the EC Treaty, (published on 28 April 1999) at ¶ 91, attached hereto as App. 12).

30. The Commission neither adjudicates disputes between litigants nor acts as a neutral body for resolving disputes between an investigatee and the Commission's case officers. Whilst the Commission endeavours to be fair in its actions, the case officers act as both investigators and prosecutors and prepare the Commission's decision. There is no independent decision maker within the Commission which rules on matters of fact or law which are in dispute between the DG COMP case officers and the investigatee (or any other third party). There is no separation between, nor separate representation for, DG COMP decisionmakers and

its investigative/prosecutorial arm, as these are one and the same.

31. The Commission has rejected suggestions that autonomous administrative law judges should be appointed to undertake the decision making role of DG COMP:

> Mention has been made in some interested quarters of the introduction of administrative law judges who are autonomous and are appointed in particular to the Federal Trade Commission (FTC) and who in the United States hold, like the Commission, powers of investigation and decision in the field of competition. These administrative law judges are themselves empowered to carry out investigations and [p]ut forward decisions to the FTC. The introduction of such an authority which, moreover, does not seem to have proved fully satisfactory, at any rate in the competition field, in the United States, does not seem compatible with the institutional scheme of the Treaty. In addition, it could well make procedures in individual cases even more complicated and prolonged.

(11th Report on Competition Policy (1981) at ¶27, App. 11).

32. The ECJ, the ultimate arbiter in matters of EC law, has emphasised that the investigations of the Commission are not adversarial, holding in relation to an investigation under Articles 81 and 82:

> such an investigation ... does not constitute adversary proceedings between the companies concerned; it is a procedure commenced by the Commission upon its own initiative or upon application, in fulfillment of its duty to ensure that the rules on competition are observed.

(*British American Tobacco, supra*, at ¶ 19, App. 10). Advocate General Lenz, a member of the ECJ, had made similar comments in his opinion for the Court in *AKZO* (*supra*, at page 248, App. 7) and further emphasised that complainants are not considered parties in the Commission's enforcement process:

> Competition proceedings before the Commission are . . . not to be regarded as adversarial proceedings between the complainant and the [investigatee]. The complainant is limited to a role which corresponds to the position, under criminal procedure, of a person who reports a matter to the authorities. The competition proceedings themselves are conducted by the Commission.

(*AKZO, supra*, at page 248, App. 7).

33. Courts in England have addressed the question of the proper characterisation of the Commission's functions in relation to adjudicative functions. In *Hasselblad (GB) Ltd v. Orbison*, ([1985] 1 All ER 173, attached hereto as App. 13), the English Court of Appeal, England's second highest court, ruled that 'the Commission is acting in a manner which is dissimilar to that of either civil or common law courts of justice and that its attributes are dissimilar to such courts.' (*Id.* at 181). The Court added: 'This is not a criticism of the Commission and its procedures. It is merely an acceptance that the Commission and its procedures fall into a different category better labelled as administrative *rather than judicial or quasi-judicial.*' (*Id.*) (emphasis added).

The paramount policy of confidential treatment of information in European competition law cases

34. A significant volume of commercially sensitive information is normally received by the Commission in the course of its inquiries from a wide range of companies which often include direct competitors (as is the case with Intel and AMD). As discussed above, the Commission is required to respect the confidentiality of documents containing business secrets and there is an absolute prohibition on the release of the business secrets of an investigatee to a complainant. The ECJ has ruled:

> [A] third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets. Any other solution would lead to the unacceptable consequence that an undertaking might be inspired to

> lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets.

(*AKZO, supra*, at ¶ 28, App. 7). The Court reinforced this holding in *Samenwerkende Elektriciteits-Produktiebedrijven NV -v- Commission* (Case C-36/92 [1994] ECR I-1911, attached hereto as App. 14), where the ECJ repeated its concern over 'the extremely serious damage which could result from improper communication of documents to a competitor' (*Id.* at ¶ 38).

35. As noted in paragraph 21(f) above, there is no discovery process in DG COMP's procedures because the Commission's investigation is not an adversarial process conducted between opposing litigants (whether between private litigants or between a public body and a private litigant). To the extent that the Commission wishes to have a company comment on another company's assertions, it will do so either by asking for answers to specific questions or by providing redacted, non-confidential versions of information provided to the Commission. This is a matter for the Commission's discretion, and, save for the requirement to provide the SO to the investigatee and (in non-confidential form) to the complainant, the Commission may decide whether and when to ask any person for additional information or for commentary on certain assertions.

36. The importance of respecting the confidentiality of business secrets has arisen as an issue in the arrangements for co-operation between DG COMP and the US antitrust enforcement authorities. In 1991 it was agreed in principle between the Commission and the US government that 'it is in their common interest to share information that will ... facilitate effective application of their respective competition laws ....' (Agreement between the Government of the USA and the Commission of the European Communities regarding the application of their competition laws. OJ 1995 L 95/47, at Article III(1), attached hereto as App. 15). Pursuant to this agreement, information including business or trade secrets obtained by the Commission 'is not be disclosed to the US antitrust authorities save with the express

agreement of the source concerned.' (Commission Report to the Council and the European Parliament on the application of the agreement between the EC and the government of the USA regarding the application of their competition laws 1 January 1997 to 31 December 1997 at page 5, attached hereto as App. 16). Thus, the Commission will protect an investigatee's confidential information even from fellow antitrust enforcers in the United States.

The European Commission neither possesses the adjudicatory authority nor uses the adjudicatory procedures of the US Federal Trade Commission

37. I have read the Declaration of James F. Rill in Support of Intel Corporation's Opposition to AMD's Application. Based on the information regarding the adjudicatory powers, procedures, and practices of the US Federal Trade Commission ('FTC') set out in paragraphs 9 to 16 of Mr. Rill's Declaration, regarding which I do not proffer my own opinion, the European Commission neither possesses the adjudicatory powers of the FTC nor uses any procedures of the type described in Mr. Rill's declaration in relation to FTC adjudications.

38. Mr. Rill states that the FTC's adjudicative proceedings are formal adversary proceedings conducted by a neutral adjudicator (Rill Decl. ¶ 11). By contrast, Commission investigations cannot be characterised as adjudicative or adversarial for the reasons set out in paragraph 21 above and are not considered to be so by the Commission, the European Court of Justice or the English courts (see paragraphs 29 to 33).

39. Mr. Rill describes the appointment of the Administrative Law Judge (Rill Decl. ¶ 12) who conducts trial-like proceedings. There is no equivalent body or person involved in the procedures relating to the investigations and decisions of the Commission, as is discussed at paragraph 21(j) above. The creation of such a role has been specifically rejected by the Commission (see paragraph 31).

40. Mr. Rill also refers to the separation of functions between the FTC's investigative staff and the Administrative

Law Judge who presides over the proceedings, between the ALJ and the Commission itself, and between the Commission and the investigative staff upon commencement of the adjudicatory proceedings (Rill Decl. ¶ 11). There is no such separation of functions within the European Commission as discussed at paragraphs 21(j) and 30 above.

41. Mr. Rill describes the rights and obligations of the respondent in an FTC action, including the obligation to answer the FTC's complaint, the entitlement to file motions and the right to discovery of the respondent and other parties (Rill Decl. ¶ 13). There are no corresponding rights or obligations in European Commission investigations. The investigatee is entitled but not obliged to answer the Commission's statement of objections (see paragraph 16), and the investigatee has no entitlement to discovery against any complainant or other third party (see paragraph 21(f)).

42. Mr. Rill describes the various rights of a party to the proceedings to obtain documentary and testimonial evidence (Rill Decl. ¶ 13). The only entity with powers to obtain information and documents from another entity in a European Commission investigation is the Commission itself (see paragraphs 13 and 14), and no party has rights to obtain evidence or testimony under oath (see paragraphs 21(c) and (d)).

43. Mr. Rill describes the rights of respondents in the hearings in FTC adjudications, including the right to cross examine witnesses, the use of rules of evidence to exclude unreliable material, and the ability to subpoena third parties, including the complainant (Rill Decl. ¶¶ 13 and 14). European Commission investigations are not, as the European Commission itself has emphasised, akin to a trial (see paragraph 29), and no one has a right to cross examine any other attendee at an oral hearing (see paragraph 21(e)). There are no rules of evidence and no rules of pleading in Commission investigations (see paragraphs 21(g) and (h)). There is no ability to compel anyone to testify (see paragraph 21(d).

44. Mr. Rill states that the Administrative Law Judge renders an initial decision which is prepared independently

by the ALJ upon closing of the hearing record, and the Commission's subsequent adjudicative process upon appeal of the initial decision, which is again made independently under *ex parte* rules that bar any communications with the investigative staff (Rill Decl. ¶ 15). In a European Commission investigation, the Commission's decision is drafted by the investigative staff and it is normal for the staff to communicate throughout the process with the Commissioner in charge of DG-COMP (see paragraph 20). Although the hearing officer will prepare a report, it is restricted to issues of procedure (see paragraph 19).

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 25th day of October 2001, in Exeter, United Kingdom.

/s/ Nigel Parr
Nigel Parr LLB, LLM, PhD
Solicitor of the Supreme Court
of England and Wales

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

ADVANCED MICRO DEVICES, PLAINTIFF V. INTEL CORPORATION, DEFENDANT.	C-01-7033-MISC SAN JOSE, CALIFORNIA DECEMBER 6, 2001

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM A. INGRAM
UNITED STATES DISTRICT JUDGE

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CERTIFICATE NUMBER 8074

SAN JOSE, CALIFORNIA DECEMBER 6, 2001

PROCEEDINGS

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: This is case number C-01-0733 Miscellaneous, Advanced Micro Devices versus Intel Corporation.

Counsel, would you please state your appearances.

MR. LYNCH: Patrick Lynch and David Hurwitz for Advanced Micro Devices.

THE COURT: Thank you.

MR. COOPER: And Bob Cooper and Jim Murray for Intel.

THE COURT: All right. Now, Mr. Lynch, I guess you're up.

MR. LYNCH: Thank you, Your Honor.

Your Honor, AMD believes that Intel has violated the law of Europe, the law of the European Community as it relates to monopolization.' The only tribunal that exists in Europe to give relief for these violations and put a stop to them is the European Commission.

AMD, if it had its dredgers would much prefer to be in front of a U.S. type of administrative body that has all of the processes of the, of the U.S. discovery rules but that, that is not the law in Europe.

Section 1782 of the judicial code is designed to enable a litigant, any litigant, but particularly a U.S. litigant, to enlist

the aid of the federal courts to obtain discovery necessary to make its way in a foreign proceeding and that's what we have asked here today.

We have asked for these documents because, first of all, it's a precisely described set of documents, documents that we know to exist on, on electronic, in the electronic form on CD's that were produced in the *Intergraph* litigation. We know it's highly relevant to the subject matter of our proceeding in Europe. The materials that even are submitted by Intel indicate that in the public proceedings in the *Intergraph* case many of these documents were cited to the court in support of Integraph's claim of monopoly and monopoly power and it is those documents in particular that we are anxious to get.

As to those documents we do not believe that Intel can make any serious claim that those documents are protected by U.S. or European claims of confidentiality because under U.S. law when documents are presented to a court in support of a motion for summary judgment there is a presumption that those documents become -- go into the public domain.

But in any case, if there is a need for protection of some of Intel's documents there is ample means to do that. The issue here is not what is the appropriate precise protection for some sets of these documents but whether this is a proceeding that AMD can come to the federal courts and get necessary information.

Intel has argued that the European Commission is not a tribunal within the meaning of the statute. That argument is contrary to the expectation of the principal expert who assisted Congress in drafting the statute and it's contrary to common sense. It is true that the European Commission is not exactly identical to the Federal Trade Commission or to any U.S. institution, but the obligation of the European Commission is to make findings in individual cases on the basis of evidence as to whether there has been a violation of the law.

The European procedure gives to AMD a vested right to explain to that agency and a vested right and a right to take an appeal to the European Court of First Instance or the European Court of Justice. If the Commission believes AMD has not acted or acted inappropriately on the evidence before it and in that respect it is a tribunal that is subject to substantially the same due process procedures that exist in the United States, with reference, for example, to the Federal Trade Commission.

In fact, as a complainant, AMD has more rights for the judicial review of actions in Europe than it would to the Federal Trade Commission. So we believe that clearly the congressional intent was, almost explicit congressional intent was to make this statute available in proceedings before the European Commission and it's something of an affront to the, to the privilege of the Europeans to define their own institutions to claim that the institution, the administrative procedure that they have adopted is in some sense not a tribunal.

Secondly, it's argued that AMD is not an interested party—interested person, excuse me. The statute says interested person not interested party, doesn't require party status.

However, as I indicated under the rules of procedure in Europe and by the way these rules were put before Your Honor both by AMD and even in even greater detail by Intel, AMD has clear vested rights in the proceedings which is pending before the European Commission. It is entitled to submit a claim to the Commission. It is entitled to submit evidence to the Commission.

THE COURT: In the declaration from Dr. Par that latter thing is a little clouded in my mind. I understand I think what he said was that it's not contemplated that any initial production or request for production will emanate from anybody but the Commission and had I read that to mean that it would be not in accordance with contemplated practice that a complainant in the position of AMD could initiate that,

they could undertake to obtain things if requested but now that may be a misunderstanding.

MR. LYNCH: Your Honor, I believe the procedure works this way: the Commission has its own powers of investigation and it can demand production of documents from the parties or from any other party in its jurisdiction under the so-called Article 11 power.

The Commission could ask for these documents in its own right. We have, in fact, suggested that the Commission, that it should do so.

But the Commission is required to entertain any request of evidence by AMD or by Intel. So we are in the posture of a party, any party would be in a U.S. court, that is the court doesn't necessarily reach out and conduct discovery on its own initiative but the parties have a right to go and seek evidence and to submit evidence in support of their claim.

When I started and said that, you know, at least speaking as a U.S. lawyer it would be my drudgers that we would have the kinds of rights to prosecute the case that we would have in the United States. Those rights don't, we don't have discovery rights in Europe. There's no dispute about that, but we do have the right which the U.S. government has given us here in the United States to invoke section 1782.

If the court grants our application we clearly have the right to take the evidence that we obtain to the Commission and the Commission has an obligation to entertain that evidence and, for example, if it makes a decision, ultimately, either way, its decision must take account of all of the evidence, it must make a written record of the—of its process in either entertaining or rejecting the evidence submitted.

If we believe after the fact that that decision is incorrect, AMD has the right under European procedure to go to the Court of First Instance and challenge to either annul the Commission's action or to compel the Commission to take action if its failed to do so. Those rights certainly make AMD an interested party within the meaning of the U.S.

statute which says that any interested party, not a person rather, but any interested person may seek this relief.

Now, in theory, as I said earlier, these documents are at least partially in the public domain. These are documents that were submitted to a federal court in a contested proceeding over summary judgment and there's a common law presumption that at that point they go into the public domain. There are, because we only know of the documents that are in the public record, we have asked for production of the, of the documents that were produced in discovery going beyond those that were in the public record but for purposes of 1782 and for purposes of an order to compel Intel to respond, even if it were only limited to the public domain documents, that 1782 has given us this right to seek evidence.

If the court were to hold that we can't invoke that right, then our ability to present the European Commission with the full picture, with all of the evidence that would support our claim of wrongdoing will be curtailed.

Now, that is in part that's the choice that the European governments have made in that they don't give us discovery rights in Europe and we have to live with that but Congress didn't make that same choice. Congress made the choice that a party interested in a foreign proceeding should be entitled to get discovery with the help of the federal courts to assist it in that proceeding. This is the, this is the standard U.S. point of view about discovery that it's better that the facts come out and the court decide something on the issue of truthfulness.

THE COURT: At least with respect to those portions of the record that were received in evidence in the Alabama case, doesn't that court's protective order play a fairly significant role in this?

MR. LYNCH: I think that court's protective order—I think we did have the option, Your Honor, to go to Alabama and ask the court to unseal those documents as being inappropriate and that may be something that we would end up doing. Our, our theory in bringing, in coming to this court

was that we read section 1782 as giving us a broader right than, than just a right to the documents in the public domain and that, and that, you know, by standard venue principles this is the correct court. Both companies are headquartered in this district.

THE COURT: I appreciate that.

MR. LYNCH: So, so it, it is true, Your Honor, that if we were asking to unseal the record in Alabama I think the only appropriate place to do that would be in Alabama. These are documents in Intel's possession and they're documents that were at all times discoverable by any federal court.

The Alabama protective order does not by any federal principle have the effect of tying the hands of any subsequent federal judge in deciding what the, what the appropriate scope of discovery is in that particular proceeding before him. So we, we have, we have come asking this court for its help in getting the whole population of documents that were produced. We don't—we clearly don't have any interest in the patent side of that case and we're quite willing to work with Intel to avoid having them dump on us a massive amount of irrelevant material.

THE COURT: According to counsel's calculation only 2 out of 33 claims have any antitrust significance in that case.

MR. LYNCH: As I'm sure you recognize, Your Honor, a brief antitrust allegation can result in an awful lot of documents and an extensive allegation of a different kind may not produce a lot of discovery.

What we're—I mean, clearly we would not have any interest in, in,—we're certainly not interested in Intel's business secrets. The only thing we're interested in is the secret arrangements for business dealings and the secret arrangements to exclude AMD for competition and the secret arrangements that to set standards that AMD can't share in. How they build their processors is not a concern to us. We build, you know, a different processor which is based on a, on a complying with the same instruction set but having different internals.

So, so the concept that we're somehow interested in looking at Intel's business secrets other than the secrets that pertain to violating the competition laws is a straw man.

So, Your Honor, to sum up, it's been argued that the EC is not a tribunal. I think we have shown that the intent of Congress was not to impose on other governments our exact form of administrative bodies but to make discovery available for people preceding before the tribunal set up in the exercise of their sovereignty. And the Commission is clearly the tribunal like AMD must go to get it under relief under the competition courts. So we had to go to the commission to get relief.

We're an interested person under the European standards and we're the complainant and the party being injured by this conduct. I think there has to be reciprocity of discovery. Clearly there is a split in the circuit cases on that issue. The more recent cases the second circuit in—I'm sorry, the Third Circuit in *Bare* (phonetic) and the second circuit in *Jenollo* (phonetic) I think have clearly set a trend to reject the early cases that impose that requirement but all I can say is that there's a trend and there's a split in the case and I think the reasoning of these more recent cases is clearly the objective of Congress.

Thank you, Your Honor.

THE COURT: Thank you, sir.

MR. COOPER: I'm Bob Cooper, Your Honor.

THE COURT: Yes, Mr. Cooper.

MR. COOPER: Let me start, I think, by talking about what may be the most important decision that we have supplied to Your Honor. It's also very lengthy. It's the *XO Chemy* case. That's a decision by the highest court in the European Community. It's written by advocate general lens. That case makes several propositions very clear. The first is that a complainant before the EC is, to use the court's exact words, "limited to a role which corresponds to the position under criminal procedure of a person who reports a matter to the authorities."

Now, it's true, as Mr. Lynch says, that they can submit evidence just like someone who goes to a local prosecutor and says someone who committed a crime can submit whatever he has but basically the EC body of law as elaborated by the top court, the advocate general, is that they are limited to a role which corresponds to the person who goes to the police or goes to the prosecutor.

They have no discovery rights. There's no issue about that. And they may not, and this is perhaps the most important point, they may not in any circumstances be given access to confidential documents of an undertaking, another company, a competitor. That is an iron clad rule that the EC adheres to.

Now, there's a lot of law here that I would like to address some of it and deal with it but that overriding concern, no matter where we go, I think ultimately ends this whole issue in this court because it is clear that if the relief that, that AMD is asking for is granted, that would be an affront to the very principles that the EC wants to further in its proceedings.

It does not want a situation where a company by merely filing a complaint with the EC can then go somewhere and gain access to a competitor's secrets. It would never permit that in the EC. This is not just a matter of the EC doesn't have a discovery procedure. This is a matter of, of a concern that the EC has which transcends that whole concept.

The last thing that the EC wants, and it's clear from this opinion, is to encourage people to file complaints which can then be used as a device to gain discovery against a competitor.

Now, the EC has plenary power to seek material from those people they are investigating. And I should make it clear that in the case of, in our case, we have responded to those requests. We're only in a preinvestigation stage as I think we made clear in our papers. We're not even to the investigation stage. We have responded to the requests and, and there is no issue that, that, that Intel will produce what-

ever the Commission asks them to produce, whether it's in the United States or abroad.

So what we have here, if you were to grant this motion, you would be not only breaking new ground, you would be really creating a principle that would have I think a profoundly bad effect in terms of the Commission because anybody who wants access to the documents of a competitor files a complaint with the Commission and has immediate access. You can't do that here in front of the FTC. You can't go to the Department of Justice and file a complaint and get access to the accused documents.

So, so that is a problem. And it is a problem which will multiply because if it's the case that AMD by merely filing the complaint in front of the EC can now come to you and ask us to discard all of the documents that might be relevant in their complaint—by the way, that's not what they have asked for but I'm going to come back to that—if they could do that because they somehow qualify under the statute, which they don't, then clearly we can do that because we are the party being investigated. We can go to AMD and get all of their documents and the end result of that is going to be United States courts are going to become an international referee of discovery disputes as least if there's not any American company involved. There's on an annual basis 300 to 500 complaints that the EC investigates every year and a large number of those involve American companies. So there's a potentially disruptive problem here and that's why, that's why I think the court would be very ill-advised to consider the type of motion that AMD is making at this point.

Now, fortunately the law is quite clear about the amount of hurdles that an interested party must surmount to get this discovery and AMD cannot surmount them. They can't surmount them on the first level which is they don't qualify under the statute and they can't qualify on the second level and even if they qualified, which they don't, they can't surmount them in that this is a discretionary motion and the court must look at considerations exactly of the sort that I was just talking about. What is the policy of the EC?

And what do they want to achieve? And where are they going with their policies?

I heard Mr. Lynch say that some of these documents are in the summary judgment motion. I'm not all together clear what he's saying. It is absolutely clear to me that if any of these documents that he wants are in the public domain, he's got them. He didn't give them to the EC. I don't believe what he wants is in the public domain and if he wants to try to open up that which was protected by another court in Alabama his obligation is to go to that court and ask that court to open it up, not to come here and make an end run.

Let me talk about that end run for just a minute. This is not an end run that he's giving you a request for documents that is finely tuned to the issues that they are complaining about abroad. To the contrary. They have come in and said we want everything that you have provided on these disks in the *Intergraph* case.

That fails another test because the law is absolutely clear that if you proceed under 1782, seeking discovery in the United States and, and for the purpose of a foreign jurisdiction and if the foreign jurisdiction does not permit discovery and doesn't have any rules as to that discovery, then the federal rules of civil procedure apply. So in one sense you can cut this off real fast because AMD has not complied with the rules and given you a targeted specific request. They have given you a blunderbuss request.

Now, there's some 600,000 documents that are covered by their request and almost all of which would have nothing to do with anything abroad. They're not organized by request. They're organized as they were in the files. It's simply an improper request and that would be basis alone for Your Honor to deny this motion.

Having said all of that, let me spend a moment and talk about the key principles here because I do think they're dispositive.

We start off first with the proposition that the law requires that a party, particularly a private party who seeks documents here in the United States for use abroad, it must

be for use abroad in a tribunal that performs an adjudicatory function.

If you look to the legislative history you'll see repeatedly that the emphasis is on a tribunal, it be an administrative tribunal or quasi judicial tribunal or a court it must perform a function. AMD relies on the commentator, a reporter who recommended the change in the law, Mr. Smith. He's been all over the place on a lot of these issues but Mr. Smith is a commentator. He's not Congress, and he's not the courts and when you go through our brief I think you will see that the courts have long since Mr. Smith have made it clear what the requirements were for one to require as a tribunal abroad and those requirements are pretty clear. It must be an adjudicative tribunal.

Now, what does that mean? It's clear that that means that you have to have a separation of functions. You cannot have a person being the investigator, a prosecutor and a decision-maker all wrapped up in one, but that's what the EC is.

Secondly, you must have a proceeding where there are adversary parties. Well, this is not a proceeding where there are adversary parties. There are no rights for one to look at the other's documents. In fact, you have no right to compel a witness to appear and testify. There are no rules of evidence as we know them. There's no right of cross-examination. I mean, this is an agency that is investigating something, and indeed, we're only at the preinvestigative stage at that.

And so the first problem they have is that they cannot show that the EC is within that group of tribunals, the international tribunals that is contemplated in 1782. And I don't want to waste your time on stuff that is in the brief, but I would point out to you when you look at the material in the brief you're first going to find the view of the EC and here's what they say, I'm going to quote: "the Commission's procedure is administrative and not judicial. It must not be turned into a trial."

THE COURT: That was their 11th report?

MR. COOPER: Very good. You're ahead of me on that.

And I thought that's very important and that describes how they envision their process.

And then we, of course, have the top court, the Court of Justice saying that the EC doesn't conduct adversarial proceedings between a complainant and the undertaking counsel, counsel for the company.

And we even have the English court that looked at this whole thing and said that this is better labeled as an administrative rather than a judicial or quasi judicial proceeding. So we just don't have the type of proceeding that is contemplated by 1782.

The analogy to the FTC which runs through AMD's papers is way off the mark and I'm sure Your Honor is familiar with this over the years but when I go through the FTC, if they file a complaint, we get an independent hearing examiner who has nothing to do with that and the Commission which makes the ultimate decision cannot have any ex parte contact with the lawyers. And, and the plaintiff's counsel is represented by a group from the FTC who cannot have any contact with the—

THE COURT: It's very much different than—

MR. COOPER: Very much so. And that would qualify as an agency with an adjudicative function.

THE COURT: Yes.

MR. COOPER: We don't have that here. So you have a situation where it is not an adjudicative body. It is akin to and if there was any one case that I think is most significant in this regard it's probably the case of Judge Friendly in the case with the Inspector of India.

THE COURT: Yeah.

MR. COOPER: In that case he was looking at an Indian tax inspector. Now, this Indian tax inspector had full power to assess tax liability so in that sense it's like the EC which has the power to issue an order and enforcing what he believes the law is and Judge Friendly held that's not a tribunal as contemplated by 1782 and he went on to make an

analogy to our own I.R.S. and said that's not a tribunal either and Congress would be stunned were they to learn that 1782 contemplated that something like the I.R.S. could be a tribunal.

So I think that lays out the law and, and as a practical matter AMD can't get out of the starting block here because they can't qualify.

Having said that I don't think I need to spend much time on the concept of whether they are an interested person.

THE COURT: Uh-huh.

MR. COOPER: I would like to point out, however, if as you work through that body of law, it is very clear that to be a private party and qualify as an interested person, you have to be a litigant in the adjudicative proceeding abroad.

Now, there may be circumstances where an agency, a government agency can qualify as an interested person but a private litigant must indeed be a litigant but an interested party, a person has to be a litigant if it's a private party. So we have found no case and we do not believe there's any case where any court here has ordered discovery under 1782 because where you had a private party that was not a litigant in an adjudicative proceeding and come back to documents—and I know I'm back to my old tricks and I see the court reporter looking at me suggesting I slow down.

The last point I would like to emphasize here is AMD cannot obtain discovery in this case because under 1782 it has no right to discovery.

I touched on that briefly and Mr. Lynch makes the point and it's clearly right that there's a split of authority and that there's a threshold of authority and but I would mention that the split runs in our favor at this time. And I believe the courts which impose that requirement is the better reasoning and is persuasive, but you know, it doesn't really matter here because all of those courts end up, even the courts that say there is no absolute threshold requirement, they all turn around and say but in your discretion you should take a look at the issue. And I think that, that whether you call it an

absolute threshold requirement or whether you simply say I'm going to exercise my discretion, it seems clear to me where the EC does not under any circumstance ever want a complaining party to get access to secrets of another company just by complaining that that discretion should be exercised in favor of denying the motion here.

THE COURT: Thank you, Mr. Cooper.

MR. LYNCH: I would like to start on the point in which Mr. Cooper closed and there's a discrepancy between the position Intel takes here. He would present this to you as to each and every document covered by our demand is within the framework of European law, so-called business secret. If you have read the *XO* case which he cited, and by the way the advocate general does not announce the decision. The language of the advocate general is nothing more than a friend of the court brief. It doesn't constitute the holding of the European Court of Justice but if you read the *XO* decision you'll see that the Court of Justice held, one, that a party in the position of AMD does have a right of access to documents produced by the respondent; two, that that right mitigates the protection of the so-called secrets; and three, as Mr. Cooper said, and correctly, that the one thing that there is no discretion in the commission to do is to turn over to, to AMD or a complaining party something called a business secret of the respondent.

That business secret is a narrowly defined term and the court says that it is the duty of the commission to go through the documents and separately and make an informed decision in each case whether or not the business secret protection. You simply just can't waive your hands and say you're asking for my documents ipso facto. They're business secrets and ipso facto they're restrained business secrets.

Moreover there's nothing in European law to suggest that the European courts have an objection in policy to the receipt of documents which have been obtained in accordance with the laws of the jurisdiction where the parties come from and so in this context the United States has developed a process for dealing with business secrets and we

have 60 years of secrets with it and those 60 years of experience indicate that they're business secrets and there isn't a single case that I'm aware of where a party to the litigation has been accused of producing documents, producing documents to design a new document. There's been abuse of protective orders certainly but not of the kind.

And the notion that an American company would go to Europe and file a complaint with the European Commission in order to get discovery that it could easily get in a lawsuit in the United States, that claim, that risk doesn't exist.

So insofar as Your Honor may believe that as a matter of discretion or as a matter of commodity there's some concern about business secrets, then I agree that Mr. Cooper is correct, we should look at the Federal Rules of Civil Procedure, what do they say in that case? They say that it's Intel's burden to tell the court in a particularized way which documents we have asked for involve business secrets that are truly entitled to protection and maybe those ought to be carved out of the demand but it is our, our rules of procedure say, say that if you want a protective order for discoverable material and you're entitled to do it on the ground that trade secrets are involved, then you have to make a showing that that indeed is true. We're not entitled to simply say, there is somewhere in this mass of documents a business secret or two, and therefore, you can't have any of them.

Secondly, I would like to point out something else that Mr. Cooper said and which is indicative of the problem that AMD faces here. He says that these documents, they're 600,000 of these documents and they're not organized by request. They are—they were produced in the manner that they exist in the Intel file. So there's no way, he says, for Intel to go into that body of documents and identify by request which of the documents respond to requests of a, particular antitrust nature. And the same is true for us, the same was true for us. Our choice was either to, either to go without the documents or to ask for and there's plenty of federal authority that it's appropriate, it's an appropriate call and a document demand to define the demand by docu-

ments produced to the government and documents produced in other litigation.

So we come down again to sort of this fundamental question. The first question is is AMD entitled to any relief under section 1782 of the Judicial Code? The question is not whether there are some documents which as a matter of discretion shouldn't be produced. The question is not whether Intel couldn't on an appropriate showing exclude some documents, the question is whether AMD is entitled to any relief and as the second circuit said in the *Bare* case, the correct way to resolve that issue is to limit the order granting relief in a way that properly defines what can and can't be taken, not an outright denial of all relief.

So on that question, first of all, the contention that the European Commission is not a tribunal, you know, it was hard for me to follow the dialogue or the colloquy between yourself and Mr. Cooper but basically I think the fundamental point here is this: Congress clearly did not mandate that other governments around the world have to devise tribunals that correspond to the U.S. constitutional concept of powers. Congress did not say that the countries of Western Europe have to adopt our system of judicial, judicial, judicial, judicial legislative and any other tribunal that doesn't have that separation in powers we won't recognize and we won't give respect to.

It is true that the European Commission is not the same as the FTC. It is also true that it is not anywhere like the Internal Revenue Service.

It has very specific and they are, they are in the, in attachment—excuse me, Your Honor, attachment 5 to Dr. Par's declaration contains the regulations setting out the procedural rules which the commission follows in connection with a, with a, a third party complainant, a third party like AMD.

And you will see as you go through those rules, Your Honor, that they very clearly confer obligations on the Commission to receive and, and neutrally and independently

evaluate the evidence submitted by both the complainant and by the respondent.

In U.S. administrative law, in the -- and the only real Ninth Circuit cases that talk to 1728, the court says that 1782, 17 rather, 1782 is meant to make available discovery aid in the case of administrative or, or quasi judicial bodies. It's, it's not limited to, to administrative agencies that fit the U.S. pattern.

When we talk about quasi judicial in an administrative law context in the United States, we define quasi judicial as involving, as involving an administrative agency taking particularized evidence about the facts of a specific case and making an adjudication about that case. We distinguish that from policy making where you have hearings that are for the purpose of quasi legislative activities establishing regulations. There's no question if you look at section 4820 that the European Commission acts in a quasi judicial fashion when it is presented with a complaint that an individual company has violated in effect the European antitrust laws.

It weighs the evidence, it applies the specific evidence to the facts of that case, it speaks retrospectively. It doesn't announce rules that apply outside of the case except by a stare decisis kind of concept. It acts in every way in a quasi judicial fashion.

It is true that the Europeans have concluded that our system of having administrative law judges is not their cup of tea, but it's an abuse of the whole, of the whole spirit of international commodity to say that the United States would not aid your tribunals unless they follow the Jeffersonian and separation of powers.

Likewise to say that we're not an interested person when regulation 2842 clearly gives us rights to be heard and to take any action adverse to us that the commission arrives at and have that judicially reviewed by the Court of First Instance and if we're not happy in the Court of First Instance by the European Court of Justice. We have direct appeal rights. That appeal process is very similar to federal judicial review of administrative agencies in this country.

So what we have here is a situation where the European Commission is a European entity that follows European concepts of governmental structure. It is not, it is not a clone of the Federal Trade Commission or a clone of any other, any other body of the United States or anyone else.

THE COURT: Does the rule of the court of first instance strictly an appellate rule within this area?

MR. LYNCH: Your Honor, my understanding is insofar as it reviews actions of the European Commission it would be the equivalent of an action brought in the district court to challenge the sufficiency, for example, of compliance with Administrative Procedure Act.

The court, the court considers itself limited to a determination of whether the Commission followed its regulations. It has limited power to disagree with the Commission on the substance of the law but it doesn't retry the case de novo. It acts on the record made in the European Commission.

THE COURT: Can you have whatever they call the, call the equivalent of the judgment solely on the basis of a determination of the commission or does there have to be some—in every case some sort of determination by the court of first instance?

MR. LYNCH: My understanding, Your Honor, I don't hold myself out as an expert but my understanding of the process is that if the Commission, and let me just take an example of our complaint, if the Commission found that Intel had engaged in practices which abused a dominant position, it could order Intel, for example, to cease exclusive dealing arrangements. Intel would have the option to appeal that order.

THE COURT: I see.

MR. LYNCH: But it wouldn't have an obligation to appeal that order and the order would not be executing if it did not appeal it and the Commission can impose penalties and other sanctions in addition to giving what we would call injunctive relief.

So as I say, Your Honor, what we're talking about here is kind of a bifurcated question. The big question before you is whether the federal courts recognize that an American company seeking relief in the only tribunal that exists in Europe to give us relief for violation of the competition laws, whether we can come to federal court and get the discovery help that the Congress intended that we should have.

Whether there are parts of our demand which ought to result in protection is the second step in the process and I agree with counsel for Intel that when we talk about that part of the process, we should look to the federal rules. And we should follow—apply the federal rules by analogy and, and if Intel, in fact, has business secrets, that would be recognized and upheld by the Commission then they should be entitled to the production of particular parts of the documents and we should be able to challenge whether that showing is sufficient or not and meet and confer and have the usual process that goes on in U.S. discovery but for Mr. Cooper to ask Your Honor to sweep aside the whole request for relief because there may be some, some limited number of business secrets in this, in this batch of documents, that, Your Honor, I would believe would be to throw out the baby with the bath water.

I think the Second Circuit suggested exactly the right procedure which is, which is grant the relief but in the order limit it as the court feels is appropriate and, and AMD recognizes that from the outside looking in it's possible that there are areas which, for expediency sake and burden sake ought to be carved out of our request, and we have said all along we're perfectly willing to meet and confer with Intel about that.

Intel has not offered to look for that kind of solution. They would like Your Honor to let them stonewall us so that we are—so our hands are tied in trying to show what we considered to be a very serious violation of our ability to compete in Europe in an important market. With important connotations for the United States as well as Europe.

Thank you, Your Honor.

THE COURT: Thank you, sir. Anything further, Mr. Cooper? And Mr. Lynch can reply to anything else you would like to say?

MR. COOPER: I have a few points that may be helpful. I thought it might be useful to try to explain my understanding of the Court of First Instance.

Basically what happens is that when you get to the Court of First Instance and, for example, we're now in a pre-investigation stage. If, if the EC were to decide to issue a statement of objections and actually start a formal investigation, we would then go through that process and then if they were to conclude that there was a violation and issue an order to cease and desist, Intel would have the right to go to the court of first instance, which is a mix of appellate and original jurisdiction, but I think what distinguishes that court at least the way I look at it is that when you get to that court you suddenly have a disinterested tribunal and you have parties in front of that court, you have Intel and you have on the other hand the EC staff arguing where they're right.

So that's, that's the stage at which we move to something that looks like an adjudicative process and that is two stages removed from where we are now.

Mr. Lynch made a big point that the EC has these rules that say that it must act fairly. I would ask you to look at *Inspector of India* where Judge Friendly—as a matter of fact, let me get it. It addresses that very issue. That was the argument that was made there to support the proposition to—that in that case the Indian tax collector which is supposed to act fairly, should, should be viewed as a tribunal and Judge Friendly says, using the I.R.S. analogy, neither do we believe that most congressmen would regard the appellate division of the service, that's the I.R.S. as a tribunal although the pertinent regulations speak of proceedings and require the conferee to determine the correct amount of the tax with strict impartiality between the taxpayer and the governor. Granted that regulations are major officials to act fairly. They remain tax collectors and not adjudicators.

They do not have and they are not supposed to have the complete objectivity normally associated with a tribunal. So that's really the key issue here and what we have is a body of law that has developed which is quite strong that makes it clear that when you have a, a person which is just a private party coming to the court here saying I would like to have discovery in connection with a matter proceeding in a tribunal abroad, you have to show that it is an adjudicated tribunal and that's simply the task, they can't get past that test here so that should end the issue.

And it is a good test because otherwise you do open up our courts to endless discovery disputes because this will be the jurisdiction where everybody will come to get massive discovery because we permit massive discovery and most other jurisdictions don't in this world.

The advocate general as I understand it when we're talking about the *XO Chemy* case. My understanding is that the advocate general is part of the staff of the court. And the court makes a decision and the advocate general's job is to explain the rationale behind that decision so what you have there is the rationale behind the decision of the highest court of the European Union. And the advocate general participates on the court and writes that decision and so that's what we look to when we look to a body of precedent that emanates from the EC.

With respect to this whole issue of what documents are properly secret and what documents are not, that's an issue that is really way down the road because I don't think that Your Honor should reach that issue. There are multiple reasons why this discovery should not go forward at all but it is clearly the case that it's not our obligation to have to go through something that was done for another case which involves almost entirely different issues and massive discovery and sort through all of that which is irrelevant in large part if not entirely to the issues that AMD is raising and then sort out what are business secrets and what are not business secrets and there's something backwards about that.

If you reach the point where you think they have some rights under 1782, which I don't think they do, still it seems to me the proper course of action here is to dismiss this because this was improperly put. They have to go back to the drawing boards.

THE COURT: Thank you, sir.

Mr. Lynch, anything further?

MR. LYNCH: I think that if you, I think that Mr. Cooper would agree with me at the end of the day that the advocate general is more like the solicitor general here than a spokesman for the court but it really doesn't matter because it's certainly true that in that case the European Court of Justice held that business secrets are protected and what the point I want to make is that the court doesn't take just a blunderbuss assumption that everything is.

THE COURT: Well, yeah. I thank you gentlemen for your good arguments and I wish you a happy holiday season.

(Whereupon, the proceedings in this matter were concluded.)

CERTIFICATE OF REPORTER

I, the undersigned official court reporter of the United States District Court for the Northern District of California, 280 South First Street, San Jose, California, do hereby certify:

That the foregoing transcript, certificate, inclusive, constituted a true, full and correct transcript of my shorthand notes taken as such official court reporter of the proceedings hereinbefore entitled and reduced by computer-aided transcription to the best of my ability.

/s/ IRENE RODRIGUEZ
IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER CSR 8074

Supreme Court, U.S.
DEC 31 2003
OFFICE OF THE CLERK

(13)

No. 02-572

IN THE

Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Section 1782 of Title 28 authorizes federal district courts to order discovery "for use in a proceeding in a foreign . . . tribunal, including criminal investigations conducted before formal accusation." The questions presented are:

1. Whether section 1782 entitles a private antitrust complainant to pre-litigation civil discovery in the United States that would be unavailable both (a) under any provision of U.S. law if the complaint had been lodged with U.S., rather than foreign, law enforcement authorities and (b) under the law of the foreign jurisdiction itself if the evidence were located there rather than in the United States.

2. Whether section 1782 allows civil discovery by a private person when no "proceeding" before a foreign "tribunal" is pending or even imminent.

PARTIES TO THE PROCEEDINGS

The only parties to this proceeding are identified in the caption.

RULE 29.6 STATEMENT

Petitioner Intel Corporation is a publicly traded corporation, and no publicly held company owns 10% or more of its stock.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 292 F.3d 664. The opinion of the district court (Pet. App. 13a-15a) is unreported.

JURISDICTION

The court of appeals entered its decision on June 6, 2002. A timely petition for rehearing or rehearing en banc was denied on September 3, 2002 (Pet. App. 11a). The petition for a writ of certiorari was filed on October 11, 2002, and was granted on November 10, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1782. Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

INTRODUCTION

Section 1782 of Title 28, entitled "Assistance to foreign and international tribunals and to litigants before such tribunals," authorizes a federal district court to grant discovery "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." Congress's express purpose in enacting this provision was to promote international comity by "adjust[ing U.S.] procedures to the requirements of foreign practice and procedure." S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788. The statute is thus designed to place courts and litigants in a foreign country, when seeking evidence available only in the United States, in a position similar to the one they would occupy if the evidence were located in the litigation forum's country. Congress hoped to encourage foreign governments to reciprocate by adjusting their own procedures to accommodate the rules of litigation in the United States. As discussed below, Congress's ultimate objective was to foster a system of international cooperation that respects the rules of different legal regimes by making the geographic location of a document or person largely immaterial to the particular fact-finding process established by the "tribunal" conducting the "proceeding."

Respondent Advanced Micro Devices, Inc. ("AMD") seeks to use section 1782 to obtain civil discovery in the United States concerning its closest competitor, petitioner Intel Corporation. AMD is not, however, a litigant in any "proceeding" before a foreign "tribunal." Instead, AMD claims entitlement to such discovery on the grounds that it has *complained about* Intel to a law enforcement agency—the Commission of the European Communities ("Commission" or "EC")—and that the EC's current "pre-investigation" might someday ripen into an actual "proceeding" before some European "tribunal." It is undisputed, however, that European law would not authorize AMD to obtain the requested documents if they were in Europe rather than the United States. Indeed, AMD would have no

right to obtain those documents under European law even if a "proceeding" were one day to arise out of the current investigation. It is similarly undisputed that AMD, as a non-litigant, could not claim entitlement to those documents under U.S. law simply by asserting that it may some day initiate an actual "proceeding" before a U.S. "tribunal." AMD thus implausibly argues that section 1782 enables private parties to circumvent the fundamental American rule against pre-litigation private discovery simply by filing a complaint with a law enforcement authority in a foreign jurisdiction that *likewise* precludes such discovery (as well as discovery during any litigation that might ensue).

Treating section 1782 as a font of "liberal discovery" (Pet. App. 8a), the Ninth Circuit nonetheless ruled for AMD. It held, in essence, that a private non-litigant may use the federal courts to conduct, for the ostensible benefit of a foreign law enforcement authority, a massive fishing expedition that is otherwise forbidden under U.S. law and that, for sound policy reasons, the foreign authority itself would not authorize if the evidence in question were within its jurisdiction. And the Ninth Circuit separately held that such discovery is available where, as here, no "proceeding" before a foreign "tribunal" is underway or even imminent. Under the logic of that approach, any company wishing to discover its competitors' most sensitive corporate documents could obtain them under section 1782 simply by announcing a present intention to trigger adjudicative proceedings somewhere in the world at some point in the future.

In each respect, the Ninth Circuit's position conflicts with the text, history, and purposes of section 1782. Indeed, as the EC itself makes clear in its nearly unprecedented amicus brief on the merits, the construction adopted by the court of appeals would subvert the very comity objectives that prompted Congress to enact this statute. It would, in particular, (i) "undermine the European Community's carefully balanced policies regarding the disclosure of confidential information," (ii) "encourage companies to file pretextual complaints with the Commission solely in order to use Sec-

tion 1782, wasting the Commission's scarce resources," (iii) imperil key EC programs "by jeopardizing the Commission's ability to maintain the confidentiality of documents submitted to it," and (iv) "greatly burden the Commission and other foreign sovereigns by requiring them to monitor and appear in district court proceedings throughout the United States in order to explain their interests in blocking such requests."[1]

STATEMENT

1. The History of Section 1782

Congress enacted the principal precursor to section 1782 in 1948. As slightly amended in 1949, the statute provided:

> The deposition of any witness residing within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found. The practice and procedure in taking such depositions shall conform generally to the practice and procedure for taking depositions to be used in courts of the United States.

Act of June 25, 1948, Pub. L. No. 80-773, § 1782, 62 Stat. 869, 949, *as amended by* Pub. L. No. 81-72, § 93, 63 Stat. 89, 103 (1949).[2] The types of discovery permitted under section 1782

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[1] Brief of Amicus Curiae The Commission of the European Communities Supporting Reversal 4-5 (filed Dec. 23, 2003) ("EC Amicus Br.").

[2] Under the previous, Civil-War era "letters rogatory" statute, United States courts were authorized to order discovery for use in foreign proceedings only to assist suits "for the recovery of money or property" in which a foreign country was a "party" or "ha[d] an interest." 12 Stat. 769, 769 (1863). Under these restrictive terms, the federal courts generally denied foreign requests for such assistance. *See* Walter B. Stahr, *Discov-*

were significantly more limited than under the current version of section 1782. Because the statute authorized only "deposition[s]," *id.*, district courts were generally without authority to order the production of documents located within the United States. Moreover, district courts could order such depositions only for the benefit of a "*court* in a foreign country," *id.* (emphasis added), a concept that excluded a broad range of foreign adjudicative and quasi-adjudicative tribunals.

As the volume of litigation with international aspects grew in the postwar era, Congress perceived an increasing need for greater collaboration between the United States and other countries in such discovery-related matters. Congress responded to that need by forming a Commission on International Rules of Judicial Procedure ("Commission") and authorizing it to "study existing practices of judicial assistance and cooperation between the United States and foreign countries" with an eye toward improving "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743 (1958). The Commission recommended an overhaul of section 1782, which Congress ultimately adopted in 1964. The new statute provided, in relevant part:

> **§ 1782. Assistance to foreign and international tribunals and to litigants before such tribunals**
>
> (a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct

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ery Under 28 U.S.C. § 1782 for Foreign and International Proceedings, 30 VA. J. INT'L L. 597, 601-602 (1990).

> that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. . . . The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

Pub. L. No. 88-619, § 9(a), 78 Stat. 995, 997 (1964).

Congress undertook these comprehensive revisions to section 1782 as part of a broader effort to "bring[] the United States to the forefront of nations adjusting their procedures to those of sister nations and thereby provid[e] equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects."[3] True to that goal, this new section 1782 promoted comity between the U.S. and other countries by expanding the scope of discoverable evidence to include "document[s]" and "other things" as well as deposition testimony; by providing that such discovery could be ordered for use not just in foreign "courts," but also in foreign "administrative tribu-

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[3] Letter of Oscar Cox, Chairman, Commission on International Rules of Judicial Procedure, to Hon. John W. McCormack, Speaker, U.S. House of Representatives, May 28, 1963, attached to S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3793. Congress took these steps largely in the hope "that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures." *Id.*; *see also* Fourth Annual Report of the Commission on International Rules of Judicial Procedure, H. Doc. No. 88, 88th Cong., 1st Sess. 9 (1963) ("It is equally important to secure parallel and compatible improvements in the procedures of other countries. The Commission's work would be less than half done if we made all the necessary changes at home to aid courts and litigants abroad and ignored the need for similar changes abroad necessary to aid United States courts and litigants.").

nal[s]," "quasi-judicial agenc[ies]," and criminal "proceedings pending before investigating magistrates," *id.*[4]; and by "adjust[ing U.S.] procedures to the requirements of foreign practice and procedure." S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

Whereas Congress expressed its clear intent to "assist[] foreign and international tribunals and litigants" and to "adjust[]" U.S. procedures to match foreign procedures, *see id.* at 3788, it left no trace of any contrary intent to *disregard* those tribunals' procedures by granting discovery that would be precluded if the evidence were located physically within their jurisdiction rather than in the United States. There is, in particular, no suggestion anywhere in the legislative record that Congress wished to give private non-litigants like AMD a new right to obtain *pre-litigation civil* discovery, which is almost always unavailable both here and abroad. *See* pp. 19-20, *infra*. Although Congress authorized "any interested person" to seek discovery under section 1782, Congress used that language because the class of persons entitled to invoke the statute extends beyond litigants to include officials acting on behalf of a foreign sovereign.[5]

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[4] In discussing the need to grant assistance to "investigating magistrates," the Senate Report cited an address by the French consul general in New York regarding the difficulty that French *juges d'instruction* had encountered in receiving discovery assistance from United States courts under the pre-amendment version of section 1782. *See* 1964 U.S.C.C.A.N. at 3788 (*citing* Lelièvre, Address, in *Letters Rogatory* 13 (B. Grossman ed. 1956)). The role of these *juges d'instruction* in the French judicial system is confined to criminal matters. *See* Gene D. Cohen, *Comparing the Investigating Grand Jury with the French System of Criminal Investigations: A Judge's Perspective and Commentary*, 13 TEMP. INT'L & COMP. L.J. 87, 88-89 (1999).

[5] *See* 1964 U.S.C.C.A.N. at 3789 ("A request for judicial assistance under the proposed revision may . . . be made in a direct application by an interested person, such as a person designated by or under a foreign law, or a party to the foreign or international litigation."); *see also In re Request for Assistance from Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1154-1155 (11th Cir. 1988). Indeed, as discussed below (at note 14), each time the legislative history discusses the class of private

Beyond that narrow subclass, section 1782 is designed to accommodate, as the provision's title itself confirms, the needs of "foreign and international tribunals and [of] *litigants* before such tribunals." 28 U.S.C. § 1782 (title) (emphasis added).

Confirming the same conclusion is a companion provision, 28 U.S.C. § 1696, that Congress also enacted in 1964 as part of the same legislative package that included section 1782. Section 1696 authorizes a federal district court to "order service . . . in connection with a proceeding in a foreign or international tribunal" pursuant to a "request made[] by a foreign or international tribunal or upon application of *any interested person*." 28 U.S.C. § 1696(a) (emphasis added). In that context, the class of private parties qualifying as "interested persons" *must be* confined to litigants, because of course there is no "process" to serve in the private civil context unless litigation has commenced. As is the case under section 1782, public officials who seek process before litigation—such as prosecutors seeking discovery before indictment—would also qualify as "interested persons."

In 1996 Congress amended section 1782 once more, in part to accommodate the needs of the international tribunals for Yugoslavia and Rwanda. Congress added what is now the final clause to the first sentence of section 1782(a), expanding the class of foreign matters for which discovery may be ordered to include "criminal investigations conducted before formal accusation." National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 186, 486 (1996). Congress made no similar provision for the taking of pre-litigation civil discovery by private parties.

2. AMD's Complaint to the EC

The foreign law enforcement inquiry on which respondent AMD has predicated its request for section 1782 dis-

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applicants entitled to seek discovery under section 1782, it identifies them as "litigants."

covery is a "preliminary investigation" (Pet. App. 3a-4a) by the EC. AMD triggered this investigation by complaining to the Directorate General for Competition—the EC's administrative department responsible for competition policy and enforcement—that Intel had engaged in anticompetitive practices in violation of Articles 81 and 82 of the European Community Treaty, which are roughly equivalent to Sections 1 and 2 of the Sherman Act. Because the structure of EC antitrust investigations is key to a proper understanding of this case, we discuss it in some detail before we address AMD's specific request for pre-litigation civil discovery.

a. Through the Competition Directorate General, the EC enforces the European Community's antitrust regime. In the field of competition, the EC performs both law enforcement functions, including the investigation and prosecution of alleged infringements of Articles 81 and 82, and regulatory functions, including the promulgation of rules and guidelines implementing the legal regime.

In performing its law enforcement functions, the EC wields extensive powers to investigate violations of Articles 81 and 82. Among other things, it is empowered to conduct "dawn raids"—on-site inspections at companies' premises conducted without prior notice. J.A. 91. It is also empowered, under Article 11 of European Economic Community Council Regulation 17, to issue requests for documents and for answers to written questions (these are known as "Article 11 requests") and to compel responses to such requests through various sanctions. *Id.* In part because the EC has such extensive authority to obtain directly for itself any information it deems relevant, it relies on its investigative powers to obtain documents from companies under investigation and does not depend upon private complainants to conduct that function on its behalf. J.A. 95.

Accordingly, complainants to the EC have limited rights. Under applicable European law, complainants are "limited to a role which corresponds to the position, under criminal procedure, of a person who reports a matter to the authorities." *AKZO Chemie BV* v. *E.C. Comm'n*, [1987] 1

C.M.L.R. 231, 248. Complainants have no discovery rights and "may not in any circumstances be given access to documents containing business secrets" of a competitor. *Id.* at 259. Indeed, complainants have no right to view any documents submitted to the EC during a preliminary investigation of the type now pending. J.A. 93-94.

Upon the receipt of any complaint charging anticompetitive practices, the EC conducts a preliminary inquiry before deciding whether to take more formal prosecutorial steps. J.A. 90-91. At the conclusion of this preliminary investigation, the EC may proceed on the complaint only if it concludes *both* that a violation of Article 81 or 82 may have occurred *and* that such violation is "significant enough" to warrant further attention. J.A. 50. If the EC eventually decides *not* to expend its prosecutorial resources by proceeding to this second stage, the complainant may then appeal to the European Court of First Instance, which would exercise limited review of this *nol pros* decision and, at most, would remand the matter back to the EC for additional investigation. *See* Pet. App. 4a. In the event of such an appeal, the complainant may be granted very limited access to the Commission's file on the complaint, but even then the complainant is never entitled to access to the confidential documents of the party under investigation. J.A. 92-94. If, on the other hand, the EC has reason to believe both that a violation may have occurred and that such violation is worthy of its prosecutorial resources, it launches a second stage of its inquiry by issuing a so-called Statement of Objections. J.A. 50, 127. In this more formal stage, the *party under investigation* (as opposed to the complainant) has the right to request a non-public hearing to present its views to the EC. J.A. 94.

Although (as discussed below) the Ninth Circuit erroneously found otherwise, the EC continues to act in this second phase as a law enforcement agency, not as an adjudicator. In particular, "[a]n accurate understanding of the European Commission's nature and functions should rule out any application of the term 'tribunal' to it." EC Amicus Br. 3. As

in the first phase, the EC's second-phase investigation "does not constitute adversary proceedings between the companies concerned." *British Am. Tobacco Co.* v. *E.C. Comm'n*, [1988] 4 C.M.L.R. 24, 56. A complainant has no discovery rights whatsoever and, indeed, has no right of access even to submissions to the EC itself. J.A. 96. If a hearing is held, no rules of evidence apply, and the EC makes no provision for taking testimony under oath, compelling the testimony of material witnesses, or cross-examining any witness. J.A. 95-96. Although the complainant may observe the hearing, this "limited, observer's role . . . in no way marks the Commission's proceedings as adjudicative." EC Amicus Br. 8.

The EC also maintains no separation of prosecutorial and decisionmaking functions in either the first or the second phase of the investigation. The EC does not employ judges or any other independent decisionmakers to resolve substantive disputes between its investigating case officers and companies under investigation; instead, the same investigators that conduct "dawn raids" may themselves prepare the EC's decision. J.A. 96.[6] Simply put, the EC "is an arm of

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[6] The court below mistakenly assumed that an advisory committee of EC member states drafts the ultimate EC decisions as a neutral decisionmaker. Pet. App. 4a, 6a-7a. In fact, the EC advisory committee does not draft the EC's decisions; such decisions, including all determinations of law and fact, are prepared instead by the investigative staff. J.A. 91; *see* EC Regulation 17, Art. 10(5) (J.A. 38) (requiring that notice to advisory committee must enclose "a preliminary draft decision"). Because the advisory committee performs only an "advisory task," moreover, it does not conduct an independent review of the evidence gathered in the investigation and instead is merely "informed of the main points of fact and law" by the EC's staff. *Radio Telefis Eireann* v. *E.C. Comm'n*, [1991] E.C.R. II-485, 499-500; *see also* EC Regulation 17, Art. 10(6) (J.A. 38-39). And the EC is free to disregard the advisory committee's advice in any event. *See, e.g., France* v. *E.C. Comm'n*, [1998] 4 C.M.L.R. 829, 860 n.58. The court was also incorrect in assuming that an independent hearing officer issues a recommended decision *on the merits* to the EC. Pet. App. 4a. To the contrary, the hearing officer reports to the EC solely on "procedural issues." Commission Decision of May 23, 2001, 2001 O.J. (L 162/21), Art. 13 (J.A. 25).

the executive and *nothing like a tribunal*." *Hasselblad (GB) Ltd.* v. *Orbinson*, [1985] Q.B. 475, 480 (emphasis added).[7]

b. On October 23, 2000, AMD complained to the EC about Intel's alleged violations of the European Union's competition laws. J.A. 98. Three months later, on January 18, 2001, the EC sent Intel an Article 11 request for information. *Id.* The request asked Intel to produce documents and answer questions related to AMD's general allegations. *Id.* Intel replied to the request on February 28, 2001. *Id.* Three months later, the EC provided Intel with a redacted copy of AMD's complaint and gave Intel an opportunity to respond to it. J.A. 99. In August 2001 Intel provided the EC, but not AMD, a response to AMD's redacted complaint. *Id.* The EC has not asked Intel to answer any further Article 11 requests, and the investigation remains in this preliminary phase. *Id.* Although the EC has provided AMD with a redacted copy of Intel's reply to the Article 11 request, it has never given AMD—and AMD has no legal right to receive—Intel's subsequent response to AMD's complaint. J.A. 93-94. Neither Intel nor AMD has been provided with copies of any other submissions made by the other to the EC. For example, Intel itself has never been given access to an expert report submitted by AMD with its Complaint to the EC. It also has not been given access to additional submissions made by AMD after its original complaint. There is no process, and no obligation, for complainants and companies under investigation to serve each other with their submissions to the EC. J.A. 96.

During this preliminary inquiry, "AMD encouraged the Commission to seek *for itself* the documents specified in

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[7] *See also id.* at 497 (holding that "the [EC] is acting in a manner which is dissimilar to that of either civil or common law courts of justice" and is "better labelled as administrative rather than judicial or quasi judicial"); European Commission Eleventh Report on Competition Policy (Commission's "procedure relating to restrictive practices and abuse of a dominant position is administrative and not judicial; it must not be turned into a trial") (J.A. 35).

AMD's Section 1782 request" (EC Amicus Br. 6 (emphasis added))—documents that Intel had earlier produced in unrelated litigation in the United States with a company called Intergraph Corporation.[8] But "the Commission, exercising its investigative discretion, has declined to do so." *Id.*

3. AMD's Efforts to Obtain Pre-Litigation Civil Discovery under Section 1782

On October 1, 2001, AMD took its discovery request to this country and applied for discovery under 28 U.S.C. § 1782. J.A. 40. AMD asked the district court to compel Intel, ostensibly for the EC's use in the ongoing preliminary investigation, to produce to AMD the very documents from the *Intergraph* proceeding that the EC itself had declined to pursue. J.A. 41-42. The total volume of documents sought by AMD has been estimated at approximately 600,000 pages. J.A. 122. Intel argued in response that section 1782 does not authorize such discovery because, among other considerations, AMD is not currently a litigant in a "proceeding" before a "tribunal" and, in any event, AMD has no right to documents that are not discoverable under the law of the foreign jurisdiction for whose benefit they are supposedly sought.

The district court denied AMD's application. Pet. App. 15a. The court emphasized that AMD's complaint to the EC "is in the initial stage of preliminary inquiry" and that the EC, "in the conduct of an investigation, performs the functions of investigator, prosecutor and decision-maker without any separation." *Id.* at 14a. The court thus concluded that the EC does not conduct adjudicative "proceedings" and is not a "tribunal" for purposes of section 1782. *Id.*

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[8] In that lawsuit, Intergraph had accused Intel of patent infringement as well as various other state and federal law violations, including antitrust violations. Intel prevailed on the merits of the antitrust claims in that suit. *Intergraph Corp.* v. *Intel Corp.*, 88 F. Supp. 2d 1288 (N.D. Ala. 2000), *aff'd*, 253 F.3d 695 (Fed. Cir. 2001).

The court of appeals reversed. It held that, to qualify for discovery under section 1782, AMD need not be a litigant in an ongoing or even imminent foreign adjudicative proceeding. It is enough, the court reasoned, that the current preliminary investigation may eventually "lead[] to quasi-judicial proceedings," in that an ultimate EC decision to prosecute would trigger a more formal second-stage inquiry and a decision not to prosecute would be subject to judicial review. Pet. App. 6a. In the court's view, the second-stage EC inquiry is sufficiently "quasi-judicial" that its prospect triggers discovery rights in the United States under section 1782, even though the EC does not separate its prosecutorial and decisionmaking functions in competition investigations, Pet. App. 14a, and never conducts "adversary proceedings between the complainant and the undertaking concerned," *AKZO Chemie*, [1987] 1 C.M.L.R. at 248. Finally, rejecting the need for any "threshold showing . . . that what is sought be discoverable in the foreign proceeding," the court found it inconsequential that EC procedures categorically deny AMD the very discovery that it seeks, supposedly for the benefit of the EC, through United States law. Pet. App. 7a-8a.[9]

SUMMARY OF ARGUMENT

It is undisputed that, even if the documents AMD seeks were located within the EC's jurisdiction rather than in the United States, AMD would have no right to obtain them under EC law. Such private party discovery is unavailable in connection with EC antitrust investigations because the EC has deliberately chosen to keep such investigations from becoming adversarial proceedings. It is likewise undisputed

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[9] The Ninth Circuit subsequently denied Intel's motion to stay the proceedings pending disposition of the petition for certiorari. It remanded the case back to the district court to resolve questions about, among other things, the discoverability of particular categories of documents under general discovery principles. Although a magistrate judge has issued recommendations on these issues, the district court has held those questions in abeyance pending this Court's review.

that if AMD had complained about Intel to U.S. antitrust authorities rather than to the EC, it would have no right under any provision of U.S. law to obtain these documents. AMD has not filed suit against Intel and thus has not assumed the responsibilities of becoming an actual *litigant*; it is instead a mere complainant to a law enforcement authority. And, with very narrow exceptions inapplicable here, private entities have never had any right to obtain prelitigation civil discovery from prospective defendants. The principal question in this case is thus whether section 1782 entitles AMD to obtain such discovery, which is otherwise unavailable under both U.S. law and EC law, because of the geographical happenstance that the *investigation* is in Europe but the *documents* are with Intel in the United States.

It does not. Congress enacted section 1782 to place tribunals and litigants abroad in a position similar to the one they would occupy, for discovery purposes, if the evidence they seek were located in the foreign jurisdiction rather than in the United States. And Congress hoped that foreign tribunals would likewise adjust their procedures to reflect those of the United States when they consider requests for discovery for use in this country's courts. Congress thereby sought to promote a system of international cooperation that would respect the particular discovery rules of each jurisdiction, while diminishing the role that the geographic location of evidence would otherwise play in litigation with international aspects. Congress did not intend to *magnify* the importance of geographic location by granting parties far greater discovery rights when the evidence sought (or its owner) happens to be located *outside*, rather than inside, the jurisdiction where the discovery would be used. That, however, is the jarringly anomalous result AMD seeks in this case.

AMD's position is as inconsistent with the text and legislative record of section 1782 as it is with the basic comity goals of the statute. As its very title makes clear, section 1782 was enacted to render "[a]ssistance to foreign and in-

ternational tribunals and to *litigants* before such tribunals," not to mere complainants like AMD. Indeed, the last two sentences of the provision's first paragraph expressly contemplate that, in considering a discovery application, the district court will be guided either by "the practice and procedure of the foreign country or the international tribunal" or by "the Federal Rules of Civil Procedure." Nowhere did Congress express any intent to create a new species of pre-litigation civil discovery available neither in this country nor abroad. The 1996 amendment—which Congress added to ensure the availability of discovery to aid foreign "criminal investigations conducted before formal accusation"—further demonstrates that Congress wished to limit pre-litigation discovery to the one context in which it is common, both here and abroad: in *criminal* investigations, conducted by foreign sovereigns or their agents. AMD's contrary interpretation, which assumes that the preexisting text already permitted pre-litigation discovery of all kinds, would strip the 1996 amendment of any significance. And the statute's legislative history, as well as the parallel provision of 28 U.S.C. § 1696, likewise identifies the class of private section 1782 applicants as "litigants" before foreign tribunals.

Quite apart from these considerations, AMD's section 1782 application should be denied for the independent reason that no "proceeding" is now underway "in a foreign or international tribunal," and the prospect that any given "proceeding" may arise sometime in the future is entirely speculative. The Second Circuit has repeatedly held, and the Eleventh Circuit has likewise indicated, that discovery under these circumstances should be denied as inconsistent with the statutory purpose. Indeed, AMD's contrary position would once more reduce the 1996 amendment to surplusage. If the pre-amendment text already permitted discovery before the commencement of a foreign "proceeding," Congress would not have needed to act in 1996 to "includ[e] criminal investigations before formal accusation" within the scope of foreign inquiries that trigger section 1782 discovery rights. Taken to its logical conclusion, AMD's approach would permit anyone to obtain a rival's documents in the United States, even

in the absence of a foreign *investigation*, upon declaring an intent to trigger such an investigation (or file a lawsuit) at some indefinite point in the future. But Congress did not enact section 1782 as a private-sector counterpart to the Freedom of Information Act, under which anyone could obtain a private company's corporate documents on the thinnest pretext.

In sum, AMD's position in this case contradicts the text, purpose, and legislative record of section 1782, and this Court can and should reverse the Ninth Circuit's decision on that basis alone. But even if the Court were to conclude that the traditional tools of statutory construction do not compel that outcome, it should exercise its supervisory authority to do in this procedural context what it and the courts of appeals have often done: "mandate 'procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.'" *Thomas* v. *Arn*, 474 U.S. 140, 146-147 (1985) (citation omitted) (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). Specifically, like several courts of appeals, this Court should adopt rules of practice that preclude private non-litigants from obtaining section 1782 discovery either (i) where such discovery would be unavailable in the foreign jurisdiction if the documents were located there or (ii) where there is no live foreign "proceeding."

The alternative to clear rules of practice is a regime in which district courts are permitted broad discretion to resolve these internationally significant issues on an unpredictable, case-by-case basis. But that regime, as the EC observes, would "offend[] principles of comity by placing heavy and inappropriate burdens on foreign countries and their agencies." EC Amicus Br. 16. There is no mechanism by which a foreign sovereign can keep track of section 1782 litigation that might affect its interests. And in all events "that very notion—that a sovereign government should be obliged to appear regularly in courts across the United States to explain itself and its objections to Section 1782 discovery—is contrary to principles of comity." *Id.* at 17.

ARGUMENT

Granting AMD the pre-litigation civil discovery it seeks would be inappropriate for two independent reasons. First, section 1782 does not authorize a private non-litigant to come to a U.S. court to obtain, for the ostensible benefit of a foreign law enforcement authority, massive discovery that it could not otherwise obtain under U.S. law and that the foreign authority itself would not authorize the non-litigant to receive if the evidence in question were within its jurisdiction. Second, such discovery is unavailable in any event where, as is undeniably the case here, there is no live "proceeding in a foreign . . . tribunal" in the first place. We address these separate points in Sections I and II respectively.

I. SECTION 1782 DOES NOT AUTHORIZE DISCOVERY THAT WOULD OTHERWISE BE UNAVAILABLE TO PRIVATE NON-LITIGANTS UNDER BOTH U.S. LAW AND FOREIGN LAW.

1. Two undisputed facts frame the legal issues in this case. *First*, it is undisputed that EC law would not permit AMD to obtain discovery of these documents even if they were within the EC's jurisdiction rather than in the United States. J.A. 95-96; *see also* AMD Br. in Opp. to Cert. 25-30 & n.14 (leaving this point uncontested, and asserting only that the EC itself, rather than private parties like AMD, could obtain this discovery). In part because the EC has made a deliberate policy choice to avoid "adversary proceedings between the companies concerned," *British Am. Tobacco Co.*, [1988] 4 C.M.L.R. at 56, private parties cannot gain access to a rival's documents in Europe by complaining about the rival to EC antitrust authorities—just as they cannot gain access to those documents in this country simply by complaining to antitrust officials in the Department of Justice.

Second, and more generally, it is undisputed that if AMD were pursuing this matter in the United States, U.S. law would preclude it from obtaining discovery of Intel's documents, for the simple reason that AMD has not filed suit against Intel and is not a litigant against Intel in any rele-

vant proceeding. With extremely narrow exceptions inapplicable here,[10] pre-litigation discovery is unavailable to private entities. Indeed, it is axiomatic that non-litigants may not exploit the court system to conduct "a fishing expedition to prepare for filing," *In re Solorio*, 192 F.R.D. 709, 709-710 (D. Utah 2000), or otherwise "to ascertain facts for use in framing a complaint," *In re Gary Constr., Inc.*, 96 F.R.D. 432, 433 (D. Colo. 1983).

In a nutshell, the issue in this case is whether section 1782 permits a private non-litigant to circumvent that basic premise of American law, and to scrutinize the private documents of its corporate rivals, through the simple expedient of complaining about those rivals to a law enforcement authority in a foreign jurisdiction that *likewise* precludes such pre-litigation civil discovery. The answer, as several circuits have found, is no: section 1782 does not enable *non*-litigants to trawl for documents that they could not obtain under the laws of either the United States or the foreign jurisdiction on whose behalf the discovery is supposedly sought. The First Circuit has explained, among other things, that construing section 1782 to permit parties to sidestep foreign discovery limitations would "place United States litigants in a more detrimental position than their op-

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[10] Under the Federal Rules of Civil Procedure, requests for discovery made "before litigation has commenced" are governed by Rule 27. *See Tennison* v. *Henry*, 203 F.R.D. 435, 440 (N.D. Cal. 2001). Unlike Rule 26, which governs ordinary discovery taken after litigation has commenced, Rule 27 permits pre-litigation discovery only in the form of "depositions" and only where the party wishing to take them can prove "that there is a 'significant risk' that the evidence will be lost if it is not perpetuated." *Id.*; *see also Nevada* v. *O'Leary*, 63 F.3d 932, 936 (9th Cir. 1995) (Rule 27 may be used only to perpetuate limited and important "known testimony" that will otherwise be lost); *In re Solorio*, 192 F.R.D. 709, 709-710 (D. Utah 2000); *In re Gary Constr., Inc.*, 96 F.R.D. 432, 433 (D. Colo. 1983) (purpose of Rule 27 is "to prevent a failure or delay of justice," not to allow general discovery for use in framing a complaint) (internal citation omitted); *In re Boland*, 79 F.R.D. 665, 668 (D.D.C. 1978) ("it is well settled that Rule 27(a) 'is not a method of discovery to determine whether a cause of action exists'") (internal citation omitted).

ponents when litigating abroad"; that "[t]his result would be contrary to the concept of fair play embodied in United States discovery rules" and in section 1782 itself; and that, even "more importantly, foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws." *In re Asta Medica, S.A.*, 981 F.2d 1, 6 (1st Cir. 1992).[11]

As its title makes clear, section 1782 was enacted to render "[a]ssistance to foreign and international tribunals and to *litigants* before such tribunals." 28 U.S.C. § 1782 (title) (emphasis added). Congress specifically wanted to remove jurisdictional obstacles to the production of evidence that, but for its physical presence only in the United States, would be subject to discovery in a foreign proceeding. Thus, if Swiss law entitled a litigant in a Swiss tribunal to discovery of particular documents located within Switzerland, section 1782 would permit that litigant to seek discovery of the same documents if, by happenstance, they (or their owners) are located within the United States.[12] Congress designed

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[11] *Accord In re Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988) ("the district court must decide whether the evidence would be discoverable in the foreign country before granting assistance") (citations omitted); *In re Lo Ka Chun*, 858 F.2d 1564, 1566 (11th Cir. 1988) (same); *In re Letter Rogatory From the First Court of First Instance in Civil Matters, Caracas, Venez.*, 42 F.3d 308, 310 (5th Cir. 1995) ("[t]he case law in this area is very clear" in mandating "a discoverability determination when the request for information comes from a private litigant," as distinguished from a foreign government); *see also In re Letter of Request From Crown Prosecution Service of U.K.*, 870 F.2d 686, 693 n.7 (D.C. Cir. 1989) (quoting *Trin. & Tobago*, 848 F.2d at 1156).

[12] Of course, in regular litigation, a U.S. court with jurisdiction over a given multinational company could order that company to produce otherwise discoverable documents within its possession no matter where in the world they are located. But Congress enacted section 1782 to facilitate the production of evidence that, for *jurisdictional* reasons, could not easily be obtained for use in foreign proceedings. The chief context in which section 1782 removes such jurisdictional obstacles is where the evidence sought is in the United States. In contrast, if all the documents

section 1782 to serve that straightforward comity objective: *i.e.*, "bringing the United States to the forefront of nations *adjusting their procedures to those of sister nations* and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects."[13] Congress also expressed its "hope[] that the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures" to those of U.S. law. *Id.*

Through such international cooperation, section 1782 is thus designed to diminish the legal significance of a document's (or person's) geographic location. AMD's contrary position would perversely make that accident of geographic location highly material because it would entitle a nonlitigant in a foreign jurisdiction to much more expansive discovery, for ostensible use in that foreign jurisdiction, if the evidence (or person) happens to reside *outside* of that jurisdiction and in the United States instead. That outcome is not only nonsensical from a policy perspective, but is in fact inimical to the very comity objectives section 1782 is designed to promote, as the First, Fifth, and Eleventh Circuits have observed. *See* p. 21 and note 11, *supra*.

The facts of this case vividly illustrate the incompatibility of the Ninth Circuit's view of section 1782 with the comity concerns underlying that provision. European Community law places particular emphasis on precluding mere com-

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AMD sought were located in Europe, AMD could hardly expect to be taken seriously if it came to the United States and invoked section 1782 to circumvent European restrictions on the discovery of those documents for use in a European proceeding.

[13] Letter of Oscar Cox, Chairman, Commission on International Rules of Judicial Procedure, to Hon. John W. McCormack, Speaker, U.S. House of Representatives, May 28, 1963, attached to S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. at 3793 (emphasis added); *accord* 1964 U.S.C.C.A.N. at 3788 (section 1782 is designed to "adjust[]" U.S. discovery procedure "to the requirements of foreign practice and procedure").

plainants from obtaining the proprietary documents of their rivals for several reasons: not just to preclude the type of adversarial environment that the EC strives to avoid, *see* p. 19, *supra*, but also because "[a]ny other solution would lead to the unacceptable consequence that [a company] might be inspired to lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets," *AKZO Chemie*, [1987] 1 C.M.L.R. at 259 (statement of Advocate General of highest EC court). The Ninth Circuit's position would thus divert section 1782 from its intended purpose—accommodating the discovery needs of foreign jurisdictions—and would chart instead "a collision course with foreign tribunals and legislatures, which have carefully chosen the procedures and laws best suited for their concepts of litigation." *Asta Medica*, 981 F.2d at 6. That, indeed, is why the EC itself took the extraordinary step of filing a brief at the petition stage of this case urging the Court to grant certiorari and then another brief at the merits stage urging reversal. As the EC has explained in the latter brief (at 4), the Ninth Circuit's position would "undermine the European Community's carefully balanced policies regarding the disclosure of confidential information," "encourage companies to file pretextual complaints with the Commission solely in order to use Section 1782, wasting the Commission's scarce resources," and threaten basic EC programs "by jeopardizing the Commission's ability to maintain the confidentiality of documents submitted to it."

AMD's request for the *Intergraph* documents in particular reveals an additional dimension of arbitrariness to its section 1782 application. Although AMD is presumably seeking those documents for the benefit of the EC, the EC has made clear that the documents are so inconsequential *to its own investigation* that it rejected AMD's suggestion that the EC itself require Intel to produce them. *See* EC Amicus Br. 6; J.A. 111. AMD claims that it needs the documents anyway, if only because it might someday wish to cite them as a basis for any subsequent challenge in the European Court of First Instance to a possible future decision of the EC not to take action on AMD's complaint. Because that

Court would not *itself* award AMD access to the documents and would review the *nol pros* decision only on the existing record, AMD claims that a failure to obtain the documents now would subject it to a "Catch-22." Br. in Opp. to Cert. 20 n.9. But, as the United States has observed in its own petition-stage amicus brief to this Court (at 19 n.7), there is no Catch-22 here: the reason AMD cannot obtain this discovery is that *European law* does not provide for it, either at the investigation phase or at any subsequent judicial review phase. Indeed, it is undisputed that, even if the documents in question were in Europe, AMD would have no right to them under European law, and it would be in exactly the same position that it occupies under the appropriate reading of section 1782. It would make nonsense of this statute to place AMD in a superior position to obtain invasive discovery simply because the documents happen to be in the United States rather than in the jurisdiction of the forum in which AMD claims a need for them.

2. As explained, the upshot of the Ninth Circuit's decision is that section 1782 imposes civil discovery obligations in circumstances where neither foreign law nor domestic U.S. law would permit such discovery to proceed. Congress did not intend that bizarre result, and—contrary to the Ninth Circuit's reasoning—nothing in the text or legislative history of section 1782 suggests otherwise. Indeed, the text and legislative history point in precisely the opposite direction. *First*, as noted, the very title of section 1782 makes clear that the statute was enacted to render "[a]ssistance to foreign and international tribunals and to *litigants* before such tribunals." 28 U.S.C. § 1782 (emphasis added); *see also Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) ("'the title of a statute . . . [is a] tool[] available for the resolution of a doubt' about the meaning of a statute" (quoting *Trainmen* v. *Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 528-529 (1947))). AMD, of course, is neither a tribunal nor a litigant: it is a mere complainant. *Second*, the last two sentences of the first paragraph of section 1782(a) explicitly contemplate that the district court will be guided either by "the practice and procedure of the foreign country or the

international tribunal" or by "the Federal Rules of Civil Procedure." 28 U.S.C. § 1782(a). Here, as we have explained, AMD's position would permit discovery that is unauthorized under both EC law and U.S. law.

Third, the 1996 amendment—which Congress added to ensure the availability of discovery to aid foreign "criminal investigations conducted before formal accusation"—reveals Congress's intent to permit pre-litigation discovery in the one context in which it is customary, both here and abroad: in *criminal* investigations, conducted by foreign sovereigns or their agents. Because that clause conspicuously addresses only the criminal setting, Congress indicated that it did not wish to extend private pre-litigation discovery to the civil context, where it is (for all relevant purposes) nonexistent. Indeed, there is no indication that Congress ever contemplated creating new pre-litigation discovery rights in the civil context.

This same distinction—between pre-litigation law enforcement discovery conducted by foreign sovereigns and pre-litigation civil discovery conducted by private persons—appears prominently in the case law as well. Both the Fourth and Fifth Circuits have concluded that, for comity reasons integral to section 1782, the "foreign discoverability" requirement applicable to requests from private parties should not extend to requests from foreign sovereigns. Whereas "courts in the United States have routinely undertaken a discoverability determination when the request for information comes from a private litigant" so as "to avoid assisting a foreign litigant who desires to circumvent the forum nation's discovery rules," that comity rationale "is, by necessity, not present in the case where a foreign court is making a request for information, because the foreign court is, presumably, the arbiter of what is discoverable under its procedural rules." *In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venez.*, 42 F.3d at 310-11; *accord In re Letter of Request from the Amtsgericht Ingolstadt, F.R.G.*, 82 F.3d 590, 592 (4th Cir. 1996).

The legislative history supports these same conclusions. Congress left no trace of any intent to make discovery under section 1782 available to persons other than litigants, foreign sovereigns, and the designated agents of those sovereigns. To the contrary, the Conference Report accompanying the 1964 revisions consistently describes the class of potential section 1782 applicants as foreign tribunals (or officials) and private "litigants before such tribunals." 1964 U.S.C.C.A.N. at 3788.[14]

The same Report puts to rest any question about why Congress used the phrase "any interested person" in the text of section 1782 rather than (as the title suggests) "any litigant." Congress used that language simply because the category of persons entitled to invoke the statute extends beyond litigants to encompass various types of *officials* who might act on behalf of a foreign sovereign: "A request for judicial assistance under the proposed revision may . . . be made in a direct application by an interested person, such as a person designated by or under a foreign law, or a party to

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[14] *Accord id.* at 3783 (section 1782 is designed to "provid[e] equitable and efficacious procedures for the benefit of tribunals and *litigants* involved in *litigation* with international aspects"); *id.* at 3788 (section 1782 "clarifies and liberalizes existing U.S. procedures for assisting foreign and international tribunals and *litigants*"); *id.* at 3789 (application may be filed "by an interested person, such as a person designated by or under a foreign law, or a *party* to the foreign or international *litigation*"); *id.* ("proposed revised subsection (a) permits effective and desirable assistance to foreign and international courts and *litigants* before such courts"); *id.* at 3792 (transmittal letter from the Commission on International Rules of Judicial Procedure) (proposed bill is designed "to improve judicial procedures for serving documents, obtaining evidence, and proving documents in *litigation* with international aspects"); *id.* at 3793 (enactment would "provid[e] equitable and efficacious procedures for the benefit of tribunals and *litigants* involved in *litigation* with international aspects"); *id.* at 3794 (letter from President Kennedy to Congress) ("we have reached the conclusion that the procedural reforms which [the legislation's] enactment would accomplish would be most desirable from the standpoint of the administration of international justice on behalf of private *litigants*") (all emphases added).

the foreign or international litigation." 1964 U.S.C.C.A.N. at 3789; *see also Trin. & Tobago*, 848 F.2d at 1155.

The same conclusion follows from the text of 28 U.S.C. § 1696, a companion provision that Congress enacted as part of the same legislative package that included section 1782. Section 1696 authorizes the district courts to "order service ... in connection with a proceeding in a foreign or international tribunal" pursuant to a "request made[] by a foreign or international tribunal or upon application of *any interested person*." 28 U.S.C. § 1696(a) (emphasis added). The class of private parties qualifying as "interested persons" for those purposes *must* of course be limited to litigants, because private parties—unlike officials designated under foreign law—cannot serve "process" unless they have filed suit.

There is, in sum, no basis for arguing that Congress included the term "any interested person" to create a private-sector analogue to the Freedom of Information Act, such that anyone could invoke section 1782 to scrutinize documents containing the business secrets of a company simply by filing an informal complaint in some foreign jurisdiction, particularly a jurisdiction that has made a policy choice to protect those documents from discovery. Indeed, Congress could not have had any valid basis for giving complainants to foreign law enforcers greater discovery rights than complainants to domestic law enforcers (such as, for example, the Antitrust Division of the Department of Justice)—and, of course, the latter complainants have *no* right to invade the files of the competitive rivals they accuse.

II. Discovery Is Inappropriate Because There Is No Live "Proceeding In A Foreign Or International Tribunal."

Quite apart from the fact that AMD seeks discovery in the U.S. that it could not obtain in Europe, its application under section 1782 is invalid for an independent reason as well: no "proceeding" is now underway "in a foreign or international tribunal," and the prospect that any given "pro-

ceeding" may arise sometime in the future is wholly speculative.

When a party files an antitrust complaint with the EC, the EC conducts a "preliminary investigation," which, as noted, is not "considered an adversarial proceeding." Pet. App. 3a-4a. Only at the conclusion of this "pre-investigation" (J.A. 50) does the EC decide whether the complaint has sufficient merit and significance to warrant more formal prosecutorial action. Pet. App. 4a; *see also* p. 11, *supra*. For purposes of its analysis, the Ninth Circuit accepted that the EC is currently engaged in this first-stage "preliminary investigat[ion]" (Pet. App. 2a); that this preliminary investigation is not itself an "adjudicative" or "quasi-adjudicative" proceeding; that it therefore does not itself qualify as a "proceeding" before a "tribunal" under section 1782; and that no such proceeding is pending now or "imminent." *Id.* at 6a.[15] These facts remain as true today as when the certiorari petition was filed in October 2002: the EC's investigation remains in the same preliminary phase in which it was previously, and the EC has taken none of the procedural steps that must precede the closing of such an investigation.

To be sure, the current "pre-investigation" might someday *lead to* an adjudicative proceeding. As discussed, if the EC declines to pursue a second-phase investigation against Intel, AMD might elect to file suit in the Court of First Instance, which would exercise limited review of that *nol pros* decision. *See* p. 11, *supra*. Also, if the EC were to find enough merit in AMD's complaint to warrant a second-phase investigation, *and* if, after conducting a second-phase investigation, it then decided that Intel had infringed Article 82 of the EC Treaty, Intel would have the option of seeking judi-

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[15] At the petition stage of this case, AMD acquiesced in this characterization of the Ninth Circuit's opinion and, more generally, in Intel's observation that the present first-phase investigation is not itself a "proceeding" before a "tribunal." *See, e.g.*, AMD Br. in Opp. to Cert. 17.

cial review of that prosecutorial decision. At this point, however, any such scenario remains purely speculative. And, as the EC itself observes, "the prospect of judicial review of the Commission's prosecutorial decisions" cannot be "sufficient for a Section 1782 petitioner to claim that discovery is 'for use in a foreign . . . tribunal,'" for that interpretation "would open the statute to discovery requests in connection with virtually *every* administrative agency action, regulation, investigation, license or permit anywhere in the world, so long as the action is ultimately subject to judicial review. Congress cannot have intended such an extreme result." EC Amicus Br. 9 (emphasis in original).

Contrary to the Ninth Circuit's mistaken view (*see* Pet. App. 9a), a second-phase investigation would not *itself* constitute a "proceeding" before a foreign "tribunal," as the EC further confirms (Amicus Br. 5-16). Even in the second phase, as in the first phase, the EC maintains no "separation between the prosecutorial and adjudicative functions"—an established prerequisite to characterizing any proceeding as "adjudicative" for purposes of section 1782. *See In re Letters Rogatory Issued by Dir. of Inspection of Gov't of India*, 385 F.2d 1017, 1020-1021 (2d Cir. 1967) (Friendly, J.). Indeed, the same investigators that conduct "dawn raids" may well prepare the EC's decision at the conclusion of a second-phase investigation. J.A. 91, 96; *see also* p. 12 and note 6, *supra*. Moreover, it is undisputed that the EC does not view such investigations as adversarial; that a complainant has no right to any hearing unless the subject of the investigation asks for one; that no rules of evidence apply; and that no provision is made for taking testimony under oath, for compelling testimony, or for conducting witness cross-examination. *See* pp. 11-12, *supra*. For these reasons, the EC's Eleventh Report on Competition Policy emphasizes that the Commission's "procedure relating to restrictive

practices and abuse of a dominant position is administrative and not judicial; it must not be turned into a trial." J.A. 35.[16]

Given these important differences between adjudications and EC second-stage proceedings, it is no surprise that the EC itself has told this Court that "[a]n accurate understanding of the European Commission's nature and functions should rule out any application of the term 'tribunal' to it." EC Amicus Br. 3; *accord Hasselblad*, [1985] Q.B. at 480 (the EC "is an arm of the executive and nothing like a tribunal"). Indeed, the EC reports that it "is profoundly concerned that characterizing it as a 'tribunal' within the meaning of Section 1782 will have adverse collateral consequences for its ability to protect its prosecutorial and law enforcement prerogatives in other proceedings." EC Amicus Br. 14; *see, e.g.*, *Heintz Van Landewyck S.À.R.L.* v. *E.C. Comm'n*, [1981] 3 C.M.L.R. 134, 224 (holding that the Commission is not a "tribunal" under Article 6(1) of the European Convention on Human Rights, which provides that "[i]n the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing . . . by an independent and impartial tribunal," because "executive power" remains "vested" in the Commission during antitrust investigations).

In any event, the Ninth Circuit's misunderstanding of this issue is compounded by a more basic flaw in its analysis: no second-phase investigation is pending before the EC, and the prospect of a second-phase EC investigation is just as speculative as the prospect of ultimate review in the Court

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[16] *Accord Hasselblad (GB) Ltd.*, [1985] Q.B. at 497 (holding that "the [EC] is acting in a manner which is dissimilar to that of either civil or common law courts of justice" and is "better labelled as administrative rather than judicial or quasi judicial"). The EC confirmed these points not just in its recently filed brief on the merits, but also in its previous brief supporting certiorari at the petition stage, explaining there that it "*never* adjudicates disputes between parties," that "[t]he parties to a complaint cannot be considered 'litigants' before a 'tribunal,'" and that "a complainant ultimately is only a person reporting an alleged violation of the law to a public authority." EC Amicus Br. in Support of Cert. 4-5 (emphasis in original).

of First Instance. The practice of the Second Circuit for many years has been to deny discovery under section 1782 in precisely this type of situation. As that court has held, such discovery is properly limited to circumstances in which adjudicative or quasi-adjudicative proceedings are either underway or at least "imminent—very likely to occur and very soon to occur." *In re Ishihara Chem. Co.*, 251 F.3d 120, 125 (2d Cir. 2001) (internal quotation marks omitted); *accord In re Lancaster Factoring Co.*, 90 F.3d 38, 42 (2d Cir. 1996); *In re Request for Int'l Judicial Assistance (Letter Rogatory) for Federative Republic of Braz.*, 936 F.2d 702, 706 (2d Cir. 1991). The Eleventh Circuit has taken this analysis one step further, suggesting that "a private individual may need to be a litigant in a *pending* proceeding in order to be an 'interested person'" entitled to section 1782 discovery. *Trin. & Tobago*, 848 F.2d at 1155-1156 (emphasis added).

The Eleventh Circuit's suggested approach is the only way to make sense of the statutory language. Before 1996, the first sentence of section 1782(a) was ambiguous as to whether the phrase "document . . . for use in a proceeding" encompassed only documents relevant to an *actual* proceeding already underway or, more broadly, such actual proceedings plus any non-speculative future proceeding to which the discovery sought might be relevant. Congress largely resolved that ambiguity in 1996 by adding the present clause extending the coverage of section 1782 to "includ[e] criminal investigations conducted before formal accusation." 28 U.S.C. § 1782. This new clause would be surplusage if, as the Ninth Circuit held below, courts already had plenary authority before 1996 to order section 1782 discovery well before the commencement of any "proceeding" before a "tribunal." Because Congress is presumed not to have wasted its breath, the addition of this new clause, confined to *criminal* investigations, confirms that no such discovery is appropriate in the *civil* context—where, again, such pre-litigation discovery by private parties is virtually unheard of.

The Ninth Circuit's approach would make nonsense of a related statutory provision as well. In language closely

tracking that of section 1782(a), Congress authorized the district courts in 1994 to grant *pre-litigation* discovery to foreign authorities in aid of foreign antitrust investigations *only* "[o]n the application of the Attorney General . . . in accordance with an antitrust mutual assistance agreement." 15 U.S.C. § 6203(a). That provision too would be redundant if section 1782 already permitted applicants (whether foreign authorities or private parties) to obtain pre-litigation antitrust discovery (along with any other type of civil discovery) from the district courts without first securing the sponsorship of the Attorney General.

AMD has sought to shore up its position by attributing great significance to Congress's deletion in 1964 of the word "pending" from the identification within section 1782 of the foreign "proceeding[s]" for which discovery could be taken.[17] *See* Br. in Opp. to Cert. 15. But if that deletion has significance at all, it shows at most that Congress did not mean to condition discovery on the pendency of a "proceeding" in *all* contexts. As the 1996 amendment later demonstrated, Congress did want to preserve pre-litigation discovery in the criminal context, where it is commonplace. Again, however, it does not follow that Congress wished to create a brand new species of otherwise ubiquitously unavailable pre-litigation *civil* discovery.

In any event, it is doubtful that the deletion of this one word, amid a comprehensive overhaul of the statutory text in 1964, carries any real significance at all. As the Second Circuit has observed:

> [T]he legislative history makes no mention of this change and describes the broadening of proceedings

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[17] As noted, the pre-1964 version of the statute read, in relevant part: "The deposition of any witness residing within the United States to be used in any judicial proceeding pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found." *See* p. 5, *supra*.

> in language that raises a question as to whether the deletion of 'pending' was intentional or inadvertent: "The word 'tribunal' is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings are *pending* before investigating magistrates in foreign countries."

In re Request for Int'l Judicial Assistance, 936 F.2d at 705 (quoting H.R. Rep. No. 88-1052, at 9 (1963)) (emphasis added by court). Although the Second Circuit ultimately concluded that an "imminence" requirement would better suit the underlying statutory purposes than a requirement that proceedings be "pending," it did so not because it thought the legislative history compelled that result, but because it believed such an approach "does no violence to any articulated congressional objective." *Id.* at 706.

Finally, were discovery *not* conditioned on either the pendency or imminence of any "proceeding in a foreign . . . tribunal," there would be no logical stopping point to the speculative nature of the future "proceeding" on which discovery does rest. Indeed, under that approach there would be no reason in principle to keep anyone from obtaining a rival's documents in the United States, even in the absence of a foreign *investigation*, upon declaring a sincere *intention* either to trigger such an investigation by filing an administrative complaint someday or to initiate a lawsuit in a foreign forum at some unspecified future time. That, as noted, would convert section 1782 into a private-sector analogue to FOIA, under which any curious individual or firm, on the thinnest pretext, could raid the files of private companies with a presence in the United States.

III. This Court Should Alternatively Exercise Its Supervisory Authority To Impose Rules Of Practice In The Application Of Section 1782.

As discussed, the discovery request that AMD propounds here is untenable, given that (i) AMD is not a litigant in any foreign "proceeding," (ii) AMD has no right to such discovery under the laws of the sovereign it ostensibly hopes to benefit (the European Commission), and (iii) that sovereign has made clear that it does not want such discovery in any event. AMD nonetheless contends that nothing in the text of section 1782 precludes such discovery and that district courts should remain free to order it under precisely these circumstances.

For the reasons discussed in Points I and II, the text and legislative record of section 1782 make clear by themselves that such discovery would be inappropriate. Moreover, as the EC observes, any doubt on that score should be dispelled by the "strong presumption against any interpretation that undermines international comity." EC Amicus Br. 16 (citing *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963)). There is no good reason to commit the resolution of such internationally significant questions to the ultimate discretion of scores of district courts, each of which would be free to diverge unpredictably with the others on the proper scope of discovery under section 1782. Although the resolution of such issues would often implicate the interests of foreign nations, there is, as the EC points out, "no system for providing [a foreign sovereign] with notice of Section 1782 cases" percolating through the U.S. courts, "much less any regular procedure through which [it] might appear and make those interests known. More important, even if it were feasible for the [foreign sovereign] to appear in every such proceeding, that very notion—that a sovereign government should be obliged to appear regularly in courts across the United States to explain itself and its objections to Section 1782 discovery—is contrary to principles of comity." *Id.* at 17.

For these reasons and others, even if this Court were to disagree that the normal tools of statutory construction compel an appropriately narrow construction of section 1782, it would *not* follow that district courts should remain free in perpetuity to exercise broad discretion in deciding whether to grant such discovery. The two circuit conflicts addressed in this case involve recurring fact patterns, and thus recurring legal questions, in the application of section 1782. This Court can and should exercise its supervisory powers to ensure greater predictability and national consistency in this internationally sensitive area by prescribing generally applicable rules of practice to resolve such cases.

Indeed, appellate courts, including this Court, commonly exercise their inherent supervisory authority to adopt rules of practice for the lower federal courts to follow in deciding procedural issues, such as the discovery issues presented here:

> It cannot be doubted that the courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. Indeed, this Court has acknowledged the power of the courts of appeals to mandate "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution."

Thomas v. *Arn*, 474 U.S. 140, 146-147 (1985) (citation omitted) (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)). In the habeas corpus context, for example, this Court has rejected lower-court procedural decisions that "did not contravene the letter" of the governing federal statute, reasoning that the Court can and should impose procedural rules for "channeling the discretion of federal habeas courts" "[i]n light of the profound societal costs that attend the exercise

of habeas jurisdiction."[18] Here, the Court should exercise similar authority to make clear that the Ninth Circuit's philosophy of "liberal discovery" in this area (Pet. App. 8a)—and in particular its approach to each of the two circuit conflicts presented in this case—defeats the very comity objectives underlying section 1782, as the EC observes in its amicus brief.

There are few contexts in which this Court would be *more* justified in exercising such authority. Granting discovery on these facts would, as discussed, disregard fundamental differences between mere *complainants* to law enforcement agencies and actual *litigants*, who enjoy significantly broader rights. Unlike litigants, complainants have no obligation to plead a case that satisfies any standard of legal sufficiency. *See* Br. of Amicus Curiae Chamber of Commerce of the U.S., at 14. Unlike litigants, complainants do not develop evidence for use at trial; they rely on government enforcers to develop evidence and bring a case. And, unlike litigants, complainants have no obligations toward opponents; in fact, they do not even serve them with a complaint. While filing a lawsuit before an adjudicative tribunal is a serious undertaking that triggers ongoing obligations, a mere complaint to a law enforcement agency does not. Indeed, the EC took months to disclose to Intel even a *redacted* copy of AMD's complaint, and neither side has had

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[18] *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998) (internal quotation marks and citations omitted); *see also McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991) (similar approach in adopting "cause and prejudice" standard). Outside the habeas context, this Court has also articulated and applied non-constitutional, non-statutory rules of practice. *See, e.g., Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978) (per curiam) (adopting non-textually-based rule of practice for Fed. R. Civ. P. 58); *Jencks* v. *United States*, 353 U.S. 657 (1957) (adopting non-constitutional, non-statutory rule of practice for criminal discovery in federal cases); *see generally Dickerson* v. *United States*, 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals.").

continuing rights of access to the other side's submissions to the EC. *See* p. 13, *supra*.

AMD's approach would open the door to the taking of discovery by non-litigants who are unwilling to assume the burdens and obligations of being a litigant. It would expose individuals and businesses to costly fishing expeditions by rivals. It would subject U.S.-based entities to uniquely one-sided discovery burdens. *See* Br. of Amicus Curiae Product Liability Advisory Council, at 12-16. And it would subvert the foreign legal regime that section 1782 is designed to assist by flouting that regime's mandate that a complainant "may not in any circumstances be given access to documents containing business secrets" of a competitor lest it "lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets," *AKZO Chemie*, [1987] 1 C.M.L.R. at 259. As the EC fears, indulging this "powerful incentive to file pretextual complaints at the [EC]" would "cause a co-equal competition authority to waste precious time and resources on unfounded antitrust complaints." EC Amicus Br. 14.[19] Indeed, the EC adds, "those consequences are so grave that the Commission could be forced to rethink the very structure and future existence of the complaint procedure under European law. Comity is sorely lacking in such a scheme." *Id.* And, on top of these concerns, the Ninth Circuit's approach would have "adverse collateral consequences for [the EC's] ability to protect its prosecutorial and law enforcement prerogatives in other proceedings"—as where, for example, the Commission needs to convey highly dependable assurances to private companies that

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[19] For example, it would enable any company to interfere with mergers subject to cross-border review by complaining to foreign law enforcers and seeking discovery from merging competitors. Hundreds, if not thousands, of such transactions are reviewed each year by the EC and foreign enforcement agencies with similar procedures. Complainants to U.S. antitrust agencies have no right to take discovery of the accused party, but the Ninth Circuit has now conferred that right, under U.S. law, upon complainants abroad.

whatever information they provide about their own complicity in potential antitrust violations will be held in the strictest confidence. *Id.* at 14-15.

There is also no textual basis for limiting the scope of the Ninth Circuit's approach to documentary, as opposed to testimonial, evidence. By its terms, section 1732 permits district courts not just to order U.S. entities "to produce a document or other thing for use" in a foreign proceeding, but also to order any "person . . . to give his testimony or statement" for the same use. Pet. App. 17a. Unlike U.S. jurisdictions, however, the EC has made a conscious and much-discussed decision to make no provision for compelling the testimony of individuals. *See* J.A. 95-96; *see also* J.A. 35 (EC determination that competition investigations must not be turned into trials). Were the Ninth Circuit's approach upheld, competitive rivals of U.S. companies could come to the United States to circumvent deliberate European restrictions not just on documentary discovery, but on testimonial discovery as well.

In sum, by disregarding the principle that private persons must be litigants in adjudicative proceedings in order to obtain section 1782 discovery, the decision below violates the statutory requirement of a "proceeding" before a "tribunal," ignores the unavailability of pre-litigation discovery in civil cases, erroneously conflates criminal investigations and civil disputes, and frustrates clear and repeated expressions of congressional intent. Unless this Court makes clear that discovery under these circumstances is unwarranted, the Ninth Circuit's regime of "liberal discovery" will impose, at the behest of private non-litigants, onerous and potentially one-sided discovery burdens on U.S.-based individuals and businesses, while thwarting the comity interests that section 1782 is designed to serve.

CONCLUSION

The judgment below should be reversed and the case remanded with instructions to deny AMD's application for discovery under section 1782.

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IN THE

Supreme Court of the United States

INTEL CORPORATION,
Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Advanced Micro Devices, Inc. ("AMD") designs and builds microprocessing chips for computers. It is the only competitor of any consequence to Intel Corporation ("Intel"), the dominant manufacturer of microprocessors worldwide. AMD believes that Intel has abused its dominant position through a variety of schemes and practices designed to suppress competition in microprocessor markets across the globe. In 2000, to secure AMD's right to compete against Intel "on the merits" in a market free from unlawful, anti-competitive practices, AMD filed the complaint with the European Commission ("EC" or "Commission") that underlies this discovery dispute.

The only marketwide remedy for anti-competitive conduct provided under EC law is a complaint to the Commission. Unlike administrative procedures in the United States, EC rules invest complaining parties with substantial rights of active participation in the EC's investigation of a charge and in subsequent proceedings: the complainant has the right to submit evidence, which the Commission is obliged by law to consider; the right to review the EC's evidence file and to respond to a preliminary decision to dismiss the complaint; and the right to appeal to the European courts any final decision by the Commission not to take action against the target.

Pursuant to that active, participatory role, when AMD became aware of documents in Intel's possession relevant to AMD's complaint, AMD advised Commission staff. The staff chose not to ask Intel to provide the documents, perhaps because it lacked the resources to conduct a review of them. Seeking to exercise its right to submit evidence to the Commission – and thereby to create and preserve the administrative record that would underlie a potential appeal – AMD sought discovery of a discrete preexisting collection of documents directly from Intel under 28 U.S.C. § 1782. In a

circumstance where delay alone could moot AMD's application, Intel has done everything in its power to erect barriers to disclosure of this evidence. The heart of Intel's opposition has been a series of arguments about the scope of permissible discovery under the statute. As the brief of the United States demonstrates, these arguments are at odds with the text and history of the statute.

The judgment of the court of appeals should be affirmed, and the case remanded for prompt entry of an appropriately tailored discovery order requiring Intel's immediate production of documents relevant to the ongoing EC proceeding on AMD's complaint.

A. The Underlying Dispute

AMD filed its complaint with the EC on October 23, 2000, alleging that Intel had engaged in anti-competitive behavior in violation of European Community competition laws. JA 46, *see* JA 55-56 (discussing AMD allegations). Pursuant to its standard procedure, the Commission opened a file on AMD's complaint and submitted written questions to Intel concerning AMD's allegations. JA 46. Consistent with the active, participatory role a complaining party plays in Commission proceedings, *see infra* at 13-15, the EC provided AMD a redacted copy of Intel's response and sought AMD's comments. JA 46. In the course of preparing its response, AMD became aware that Intel had previously produced documents in *Intergraph Corp. v. Intel Corp.*, No. CV 97-N-3023 (N.D. Ala.), which likely would have bearing on the allegations contained in AMD's EC complaint. JA 46. Many of the documents had been submitted to the Alabama federal court itself in summary judgment proceedings and thus should be subject to public inspection. According to an expert witness who had personally reviewed the documents, they relate to, *inter alia*, Intel's market power in the relevant microprocessor market, "actions taken by Intel to preserve and enhance its position in the market," and "the impact of the actions taken by Intel to preserve and enhance its market

position." JA 55. "Many of the documents produced by Intel in the *Intergraph* case are very pertinent to the issues raised by AMD in its complaint to the European Commission and would be of great assistance to the Commission in reaching a decision on AMD's claims." JA 56.

Under EC procedures, AMD has the right to submit evidence to the Commission in support of its complaint – evidence the Commission is legally obliged to consider. *See infra* at 13. AMD could not, however, immediately obtain and submit the *Intergraph* documents because of a confidentiality order entered in that case. AMD therefore filed an application for a judicial order of discovery under 28 U.S.C. § 1782, which authorizes a U.S. District Court to order the discovery of documents "for use in a proceeding in a foreign or international tribunal."

B. Background of § 1782

As the brief of the United States observes, the current version of § 1782 "is the product of congressional efforts, over the span of nearly 150 years, to provide means to assist foreign tribunals in obtaining evidence for use in their proceedings." U.S. Br. 3.

The process of enacting the modern version of § 1782 began in 1958, when Congress concluded that the "extensive increase in international, commercial and financial transactions involving both individuals and governments and the resultant disputes, leading sometimes to litigation, has pointedly demonstrated the need and desirability for a comprehensive study of the extent to which international judicial assistance can be obtained." S. Rep. No. 85-2392, at 3 (1958). Congress created the Commission on International Rules of Judicial Procedure for the express purpose of recommending revisions to U.S. laws to improve "existing practices of judicial assistance and cooperation between the United States and foreign countries." Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743, 1743. Specifically,

Congress tasked the Commission with drafting laws that would reform the "procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." *Id.*

Short on funds, in 1960 the Commission obtained assistance in its statutory mission from Columbia Law School Project on International Procedure. *See* Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1015 (1965) ("*International Litigation*"); Hans Smit, *International Aspects of Federal Civil Procedure*, 61 Colum. L. Rev. 1031, 1072 n.168 (1961). Columbia Law School Professor Hans Smit was both Director of the Project and Reporter to the Commission. Professor Smit has been described as the "dominant drafter" of the modern § 1782, *In re Letter of Request from the Crown Prosecution Service of the United Kingdom*, 870 F.2d 686, 689 (D.C. Cir. 1989) (R.B. Ginsburg, J.), and as its "chief architect," *In re Application of Euromepa*, 51 F.3d 1095, 1099 (2d Cir. 1995).

Building on 25 years of U.S. experience with liberalized discovery, the Commission in 1963 recommended a slate of changes to the Federal Rules of Civil and Criminal Procedure and to the U.S. Code, including a wholesale revision of § 1782. *See Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, H.R. Doc. No. 88-88 (1963). Congress unanimously adopted the Commission's recommendations, with no amendments and no debate. Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 995, 997; *see* U.S. Br. 5. The Commission's explanatory notes were adopted almost verbatim as the Senate Report accompanying the legislation. S. Rep. No. 88-1580 (1964); *see* Smit, *International Litigation*, *supra*, at 1016 n.11.

The revised § 1782 reflected two closely related policies, according to its chief architect:

> First, they are designed to state the fundamental policy that [nation-]states should grant both passive and ac-

> tive assistance in this area with the greatest possible liberality. Second, they are designed to offer a model and an invitation to foreign states to follow the American example.

Hans Smit, *Recent Developments in International Litigation*, 35 S. Tex. L. Rev. 215, 229 (1994) ("*Recent Developments*"). The idea, according to the Chairman of the Commission's Advisory Committee, was for § 1782 to serve as an "example of unilateral, nonreciprocal, internal legislation . . . which other countries may wish to follow." Philip W. Amram, *Public Law No. 88-619 of October 3, 1964 – New Developments in International Judicial Assistance in the United States of America*, 32 D.C. Bar J. 24, 33 (1965). Section 1782, he explained, "is a one-way street. It grants wide assistance to others, but *demands* nothing in return. It was deliberately drafted this way." Philip W. Amram, *The Proposed International Convention on the Service of Documents Abroad*, 51 A.B.A. J. 650, 651 (1965). As the Senate Report put it, the purpose of § 1782 was to "clarif[y] and liberalize[] existing U.S. procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States," S. Rep. No. 88-1580, at 7, with the expectation that "the initiative taken by the United States in improving its procedures will invite foreign countries similarly to adjust their procedures." *Id.* at 2.[1]

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[1] Drawing from this legislative background, lower courts have consistently described § 1782 as serving "twin aims": "providing efficient means of assistance to participants in international litigation in our federal courts and encouraging foreign countries by example to provide similar means of assistance to other courts." *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992); *see In re Letter Rogatory from Justice Court*, 523 F.2d 562, 565 (6th Cir. 1975) ("The goal of the Commission was to revise the law in order to provide wide judicial assistance . . . on a wholly unilateral basis. . . . [T]he purpose behind the proposals was to prod other nations into following the lead of the United States in expanding procedures for the assistance of foreign litigants."); *accord In re Bayer AG*, 146 F.3d 188, 191-92 (3d Cir. 1998); Pet. App. 8a.

Congress was not acting altruistically. It recognized a steadily growing involvement of U.S. commerce in international intercourse, and it understood that the United States has a direct interest assisting U.S. companies doing international business in the fair and efficient resolution of foreign controversies. And Congress knew from twenty-five years of experience with discovery under the Federal Rules of Civil Procedure that the truth is most likely to be ascertained when facts are "disclosed to the fullest practicable extent" prior to trial. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958); *see Hickman v. Taylor*, 329 U.S. 495, 500-01 (1947) (pre-trial discovery system, which allows parties to "obtain the fullest possible knowledge of the issues and facts before trial," is "one of the most significant innovations of the Federal Rules of Civil Procedure"); *accord Schlagenhauf v. Holder*, 379 U.S. 104, 114-15 (1964).

The liberalizing revisions to § 1782 incorporated this general philosophy of discovery into the assistance provided to foreign tribunals in several ways, often reflecting a conscious and willful rejection of the positions now advanced by Intel.

1. *Congress Broadens Proceedings For Which Evidence May Be Sought*

The 1948 version of § 1782 authorized district courts to provide assistance for "any civil action pending in any court in a foreign country." In 1949, Congress amended the statute to replace "civil action" with the phrase "judicial proceeding." In the 1964 revision, Congress eliminated both "civil action" and "judicial," to authorize discovery of evidence simply "for use in a *proceeding* in a foreign or international *tribunal*." Congress made clear its purpose:

> The word "tribunal" is used to make it clear that assistance is not confined to proceedings before conventional courts. For example, it is intended that the court have discretion to grant assistance when proceedings

> are pending before investigating magistrates in foreign countries. . . . In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings.

S. Rep. No. 88-1580, at 7-8. "The term 'tribunal,'" Professor Smit's "authoritative commentary" (U.S. Br. 19 n.10) explained, "embraces all bodies exercising adjudicatory powers, and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts." Smit, *International Litigation*, *supra*, at 1026 n.71. Professor Smit's commentary provided only two examples of the kinds of foreign "tribunals" for whom the newly liberalized discovery assistance was intended, and they are striking, given the posture of the instant case:

> The increasing number and importance of international tribunals make this liberal provision of assistance in aid of litigation in international tribunals of great significance. New Section 1872 ensures that an important international court, such as the Court of Justice of the European Economic Community, and litigants before such a court can be given any reasonable assistance they may require. It further permits the rendition of proper aid in proceedings before the EEC Commission in which the Commission exercises quasi-judicial powers, including proceedings under Article 19 of Regulation 17.

Id. at 1027 n.73.

2. *Congress Deletes "Pending" Requirement Specifically To Facilitate Pre-Litigation Discovery*

The 1863, 1948 and 1949 predecessors to the 1964 revision had all authorized discovery only for civil actions or judicial proceedings "pending in any court in a foreign country." U.S. Br. App. 3a-4a. The 1964 revision deleted the word "pending," requiring only that the requested evidence be "for use" in a proceeding. As Professor Smit's contemporaneous commentary explained: "In the new version, the word 'pending' was eliminated to facilitate the gathering of evidence prior to the institution of litigation abroad." *Id.* at 1026-27 n.72. "The only limitation on the nature of the evidence is that it must be sought for use in a proceeding in a foreign or international tribunal. It is not necessary, however, for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be sued in such a proceeding." *Id.* at 1026.[2] The Senate Report confirms Congress's intention to authorize discovery of evidence to be used during a pre-litigation investigation: discovery is authorized, the Report states, "whether the foreign or international proceeding *or investigation* is of a criminal, civil, administrative, or other nature." S. Rep. No. 88-1580, at 9 (emphasis added).

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[2] Professor Smit has more recently reiterated the point:

> The old version of § 1782 provided for assistance in a proceeding pending in a foreign court. This requirement was deliberately eliminated. It was regarded as undesirable to limit the availability of American assistance to cases already pending, since it was realized that such assistance might be needed before proceedings had been formally commenced in the foreign court. The drafters had particularly in mind the possibility that foreign officials and other persons might wish to obtain evidence in preparing a proceeding to be commenced. . . . The word 'pending' was therefore dropped, but the requirement that the evidence be sought for use in a foreign proceeding was retained.

Smit, *Recent Developments*, *supra*, at 231-32.

In 1996, Congress again reaffirmed the point, adding to the statute language making clear that a district court may order discovery of evidence for use in proceedings in foreign tribunals "including criminal investigations conducted before formal accusation." Nat'l Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342, 110 Stat. 186, 486 (1996). Inasmuch as the statute – everyone agrees – already authorized production for use in proceedings "pending before investigating magistrates," S. Rep. No. 88-1580, at 7; *see* Intel Br. 8, the added language merely confirms, by way of example, the already existing authority to obtain evidence during the investigatory stage of a proceeding, *see* U.S. Br. 17.

3. *Congress Grants Discovery Rights To More Than Just "Litigants"*

Although the title of § 1782 refers to assistance to "foreign and international tribunals and to litigants before such tribunals," the word "litigant" appears nowhere in the statute itself. Rather, the statute authorizes district courts to upon request "by a foreign or international tribunal or upon the application *of any interested person*." Again, Professor Smit contemporaneously conveyed the intention of the drafters: "The latter term ['interested person'] is intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance." Smit, *International Litigation*, *supra*, at 1027. The Senate Report confirms that "litigants" are merely "included among (and may be the most common example of) the 'interested persons' who may invoke section 1782," U.S. Br. 19: "A request for judicial assistance under the proposed revision may . . . be made in a direct application by an interested person, *such as* a person designated by or under a foreign law, *or* a party to the for-

eign or international litigation." S. Rep. No. 88-1580, at 8 (emphasis added).

4. *Congress Rejects Foreign Discoverability Requirement*

The new version of § 1782 enacted in 1964, while significantly liberalizing available discovery, still imposed several limitations on the scope of permissible discovery: (1) the party from whom discovery is sought must reside or be found within the jurisdiction of the district court; (2) the material sought must be for "use in a proceeding in a foreign or international tribunal," (3) the party seeking production must be either the tribunal itself or an "interested person" in the foreign proceeding, and (4) material cannot be produced "in violation of any legally applicable privilege." 28 U.S.C. § 1782. The text does *not*, however, include any requirement that the material sought be discoverable in the foreign jurisdiction. To the contrary, as Professor Smit explained at the time, the text affirmatively authorizes – and was intended by its drafters to authorize – discovery that is *not* commonly allowed in certain foreign jurisdictions:

> Under new Section 1782, the district court may order the taking of both testimony and statements. Under the laws of many foreign countries, parties may not be heard as witnesses and party statements are not considered testimony. By specifically referring to statements, Section 1782 makes clear that the district court may order that parties and other persons, whose statements do not qualify as testimony under foreign practice, may be heard.

Smit, *International Litigation*, *supra*, at 1026; *see also* Smit, *Recent Developments*, *supra*, at 235 n.93 ("The drafters were quite aware of the circumstance that civil law systems generally do not have American type pretrial discovery, and do not compel the production of documentary evidence. They nev-

ertheless provided for discovery and compulsory production of tangible evidence pursuant to the federal rules.").

Responding to some recent judicial decisions (i.e., those relied upon by Intel here) that have read a foreign discoverability requirement into § 1782 for policy reasons, Professor Smit has reported that "the drafters of § 1782 specifically intended no such [foreign discoverability] requirement to apply." Smit, *Recent Developments*, *supra*, at 235. The drafters "realized that recourse to § 1782 might enable a foreign court or litigant to obtain evidence in the United States, production of which could not be compelled under foreign law," but they regarded this not only as unproblematic, but even "desirable," for three reasons. *Id.* First, it would promote the "twin aims" of the statute (i.e., providing liberal discovery to foreign tribunals in hopes of encouraging them to provide equally liberal discovery in aid of U.S. litigation): by making available to foreign tribunals and statutory "interested persons" the broad discovery generally available in American litigation, "the United States would communicate to the world at large what it regarded as the proper example to emulate in extending international cooperation and, in the process, promote better understanding and acceptance of American discovery practices." *Id.*

Second, "the drafters realized that making the extension of American assistance dependent on foreign law would open a veritable Pandora's box," *viz.*, "an unduly expensive and time-consuming fight about foreign law," something "quite contrary to what was sought to be achieved." *Id.* Forcing an American district court to become familiar with "the subtleties of the applicable foreign system," solely for the "purpose of honoring a simple request for assistance," could not be reconciled with the liberalizing goals and unilateral operation of the statute. *Id.*

Finally, Professor Smit reports that the drafters believed that even where foreign jurisdictions do not allow discovery comparable to U.S. procedures, many such foreign jurisdic-

tion nevertheless still "would generally quite readily accept and welcome the assistance American courts might grant in providing them with relevant information." *Id.* Of particular importance here given the EC's legal obligation to accept and consider any evidence submitted by a complaining party, *see infra* at 13, § 1782's drafters recognized that even where a foreign jurisdiction does not allow compulsory discovery, it still "would be most unlikely to preclude any litigant from submitting to the court any materials the litigant might like to offer." *Id.* In the worst case, if the foreign jurisdiction truly regarded "extra" discovery allowed in the U.S. as contrary to the policies of the foreign jurisdiction, it could simply refuse to admit or consider such evidence, thereby rendering the additional discovery simply meaningless. *Id.* at 235-36 (describing view of drafters that "foreign courts could always rule upon the propriety of reliance on evidence obtained through the cooperation extended by American courts when it was presented to them").

In sum, "the drafters of § 1782 regarded it as both unnecessary and undesirable to let the propriety of discovery with the aid of an American court depend upon discoverability and admissibility under foreign law." *Id.* at 236.

C. European Commission Procedures

Articles 81 and 82 of the Treaty of Rome ("EC Treaty") prohibit certain types of anti-competitive conduct affecting trade between members of the European Community. JA 89. Article 85 of the Treaty vests responsibility for enforcement of Articles 81 and 82 exclusively in the European Commission, which executes that responsibility through its Directorate-General for Competition ("DG Competition"). EC investigations can begin sua sponte or upon receipt of a complaint from "any natural or legal person[] who claim[s] a legitimate interest" in the alleged misconduct. Council Regulation 17/62, art. 3(2)(b), 1959-1962 O.J. Spec. Ed. 87; *see* JA 49.

If a proceeding is initiated by a complaint, the complaining party has numerous rights of active participation in the proceeding that are largely unfamiliar in U.S. administrative tribunal proceedings. To start, a complainant before the EC has the legal *right* to submit evidence to the Commission in support of its complaint. EC Br. 8 n.5 (citing Council Regulation 17/62, art. 19(3), 1959-1962 O.J. Spec. Ed. 87). This right is vital, because the Commission, like most enforcement agencies, has limited resources. As the EC itself recognizes, its "enforcement activity . . . depend[s] on information supplied by operators and consumers in the market."[3] But European practice does not leave a complainant subject to the vagaries of the Commission's interest in information, but, instead, imposes on the Commission the *legal obligation* to examine and consider any evidence submitted by a complainant:

> [A]lthough the Commission cannot be compelled to conduct an investigation, the procedural safeguards provided for by Article 3 of Regulation 17 and Article 6 of Regulation 99/63 [now Regulation 2842/98] oblige it nevertheless to examine carefully the factual and legal particulars brought to its notice by the complainant in order to decide whether they disclose conduct of such kind as to distort competition in the Common Market and affect trade between the member-States . . . .

Case T-24/90, *Automec Srl v. Commission*, 1992 E.C.R. II-2223, 5 C.M.L.R. 431, 478 (1992); *see* Notice on Complaints ¶ 53 ("the Commission is under a duty to consider carefully the factual and legal issues brought to its attention by a complainant, in order to assess whether those issues indicate

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[3] Draft Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty ¶ 2 (available at www.europa.eu.int/comm./competition/antitrust/legislation) ("Notice on Complaints"). The Notice on Complaints is effective May 1, 2004.

conduct which is liable to infringe Articles 81 and 82"). Further, if the Commission preliminarily decides not to proceed on a complaint, it must provide the complainant a formal explanation of its reasons and allow the complainant to respond. *Automec*, 5 C.M.L.R. at 476-77; Notice on Complaints ¶ 56. To prepare its response, the complainant is entitled to access the Commission's file and review all documents (except business secrets) on which the Commission relied in reaching its decision. JA 50, 93-94; Notice on Complaints ¶ 70. "The purpose of that intermediate phase in the administrative procedure before the Commission is, in fact, to safeguard the rights of the complainant, to whom an unfavourable decision should not be addressed without first giving him the opportunity to submit observations on the grounds upon which the Commission intends to rely." Case C-282/95P, *Guerin Automobiles v. Commission*, 1997 E.C.R. I-1503, 5 C.M.L.R. 447, 481 (1997).

Once that intermediate stage is complete, the Commission must either reject the complaint or initiate an action against the object of the complaint. *Id.* If the Commission decides not to proceed, the complainant is entitled to initiate an action against the Commission in the Court of First Instance, seeking "annulment" of the Commission's decision to reject the complaint. *Id.*; JA 50, 62; *see* EC Br. 8 n.5 (complainant has "the right to seek judicial review of Commission decisions not proceed with investigation or action on its complaint," citing Case T-24/97, *Stork Amsterdam B.V. v. Commission*, 2000 E.C.R. 309, ¶¶ 51-53); U.S. Br. 8; Notice on Complaints ¶ 78. The Court of First Instance has plenary authority review all factual and legal conclusions reached by the Commission, but its review is limited to the factual record developed by the Commission and the complainant during the proceeding up to that stage. *See Micro Leader Business v. Commission*, 1999 E.C.R. II-3989 ¶ 27. In the action for annulment, the Community courts rely on evidence submitted by the complainant during the investigative stage to

determine "first, whether the Commission has carried out the examination of the complaint which it is required to do by evaluating with all the requisite care the factual and legal aspects adduced by the applicant in his complaint." *Automec Srl*, 5 C.M.L.R. at 478; *see, e.g.*, *Micro Leader*, *supra*, at ¶¶ 57-60 (annulling EC rejection of complaint).

If the Commission does decide to proceed, "the complainant is entitled to participate" in subsequent proceedings. *Guerin Automobiles*, 5 C.M.L.R. at 481; JA 50-51. DG Competition typically issues a "statement of objections" ("SO") to the target of the complaint that specifies DG Competition's views as to the nature of the alleged infringement of competition laws and "advises the target of its intention to recommend a decision finding that the target has violated the relevant competition laws." U.S. Br. 8; *see* EC Br. 7. "The complainant has the right to make a written response to the SO." JA 93 (Intel expert); *see* Reg. 2842/98, art. 7; Notice on Complaints ¶ 64.

Upon issuance of the SO, the target has "the right to a fair hearing," Notice on Complaints ¶ 59, before "an independent hearing officer," EC Br. 7, who must "ensure that the hearing is properly conducted and contributes to the objectivity of the hearing itself and of any decision taken subsequently," Reg. 2842/98, art. 10. The complainant may participate in that hearing where appropriate. Notice on Complaints ¶ 65. After the fair hearing, DG Competition then decides "whether to recommend [to the full Commission] a finding of infringement against the target." EC Br. 7. The Commission either "dismisses the complaint, or issues a decision finding infringement and issuing penalties as appropriate." *Id.* No matter which action the Commission takes – dismissal or a finding of infringement and the imposition of penalties – that action is again subject to judicial review." *Id.*; *see* U.S. Br. 9.

Although "neither DG Competition nor the Commission as a whole is ever engaged in adjudicating rights *as between*

private parties," EC Br. 7 (emphasis added), the EC acknowledges that does have "significant responsibilities that partake of an adjudicatory character," EC Pet. Br. 4, as "in the last stage of the proceeding," when its "investigative function blur[s] into decisionmaking," EC Br. 9. As shown above, these adjudicative functions include resolving the merits of alleged violations of Community competition law, determining the legal rights of a private party target in a fair hearing, and imposing legally enforceable penalties.

D. Proceedings Below

AMD filed its § 1782 application for discovery of documents that Intel had produced in the *Intergraph* litigation on October 1, 2001. AMD submitted evidence establishing that the documents would impeach positions that Intel has taken before the EC and support AMD's complaint that Intel abuses its dominant position. JA 45-47, 54-6. The district court denied AMD's application. It held that "[t]he case is in the initial stage of preliminary inquiry," and because that stage is not itself adjudicative, it is not a "proceeding" under § 1782. Pet. App. 14a-15a.

The Court of Appeals reversed. It began by noting the many ways in which § 1782's amendments "broadened the discretion of district courts to act on foreign assistance requests." Pet. App. 5a. Specifically, the court observed that "the language used by Congress in Section 1782 is broad and inclusive, including by way of example even criminal investigations prior to formal accusation." *Id.* The court also noted that Congress had deleted the word "pending" from the statute, and had chosen the expansive word "tribunal" so that § 1782 would "include bodies of a quasi-judicial or administrative nature as well as preliminary investigations leading to judicial proceedings." *Id.* at 5a & n.2 (internal quotation marks and citations omitted).

The court then held that because the Commission is "authorized to enforce the EC Treaty with written, binding deci-

sions, enforceable through fines and penalties" and because its "decisions are appealable to the Court of First Instance and then to the Court of Justice . . . the proceeding for which discovery is sought is, at a minimum, one leading to quasi-judicial proceedings." *Id.* at 6a. Because the Commission's investigation "will lead to" a judicial or quasi-judicial proceeding, discovery is permissible under § 1782. *Id.* The court of appeals also found "nothing in the plain language or the legislative history of Section 1782, including its 1964 and 1996 amendments, to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." *Id.* at 8a.

The court of appeals remanded the case to the district court to "proceed to consider AMD's request on the merits." *Id.* at 9a. While the petition for certiorari was pending, a magistrate judge issued a recommended order of discovery, tailoring the relief to include to only those *Intergraph* documents directly relevant to the EC proceedings. The district court has held further consideration of that recommendation in abeyance pending disposition of the threshold questions presented by Intel's petition for certiorari.

SUMMARY OF ARGUMENT

I. AMD takes seriously the comity concerns advanced by the EC, but they do not justify denying AMD discovery under the terms of § 1782. Leniency Program documents are not at issue in this case, nor would they be at risk of disclosure in *any* § 1782 proceeding. Neither is there any risk that parties will amass pretexual filings with the EC simply to obtain discovery under § 1782, as 40 years of experience under § 1782 have demonstrated. Equally unfounded is Intel's contention that the EC and other tribunals would be "offended" by an order granting § 1782 discovery of documents that would not be discoverable in the foreign proceeding. The EC, in fact, affirmatively welcomes the submission of evidence by a complainant, even though it does not afford the complainant compulsory discovery rights.

II. The question whether § 1782 imposes a foreign discoverability requirement starts and ends with the statute's text, which includes no such requirement. Inquiry into the statute's history and purposes confirms the textual conclusion. The twin aims of the statute are to provide liberal U.S. discovery to those involved in foreign proceedings so as to encourage foreign jurisdictions to provide liberal discovery to those involved in American proceedings. Subjecting foreign tribunals and interested persons to a costly and time-consuming fight over the nuances of foreign law – a subject matter U.S. courts are not well-situated to address in any event – would undermine those aims. There is also direct evidence that the drafters of § 1782 specifically intended not to impose a foreign discoverability requirement on the statute. Intel's policy-based counter-arguments are meritless, irreconcilable with the statute, and directed at the wrong branch of government.

III. AMD's request in this case unambiguously seeks documents "for use" in a "proceeding" in a "tribunal." First, the documents AMD seeks will be used in the quasi-judicial and judicial proceedings that necessarily will result from the current stage of the EC's proceedings. Even assuming the current investigative stage is not yet a pending "proceeding," § 1782 does not require that a proceeding be "pending" before discovery may be ordered. Indeed, Congress consciously deleted the word "pending" from the statute in the 1964 revision, for the specific purpose of facilitating discovery prior to the initiation of litigation. Neither the text nor history of the statute supports Intel's theory that Congress meant to preserve, *sub silentio*, a "pending" requirement for civil cases alone. Second, the current EC proceeding is, in any event, itself a "proceeding" in a "tribunal" within the meaning of § 1782. Indeed, the contemporaneous historical record shows that § 1782's drafters specifically considered EC proceedings to be within the compass of the statute.

IV. AMD's discovery request should not be denied as a matter of discretion. This Court should not impose, as general rules governing the exercise of discretion, the very requirements Congress chose *not* to include in the statutory text, especially given Congress's repeatedly demonstrated ability to adjust the statute in response to perceived policy concerns. Nor does the presence of the EC as amicus support denial of discovery in this particular case. The EC does support aspects of Intel's untenable interpretation of the statute itself, but it makes no suggestion that, if the statute must be read as allowing the district court to order production to AMD, the court nevertheless should deny AMD the documents it seeks. The EC would be obliged to consider such evidence if AMD obtained and submitted it, and such evidence could be of significant value not only to the EC's investigation, but also to any subsequent judicial review of the EC's decision whether or not to act against Intel. To secure the benefits of such discovery, however, an order must be issued promptly, so that AMD's procedural right to support its EC complaint can be vindicated, and its substantive right to operate in a competitive marketplace can be protected.

ARGUMENT

As the brief of the United States demonstrates, nothing in the text or history of § 1782 supports Intel's arguments that AMD's discovery request should be denied on the ground that § 1782 bars discovery unless the evidence sought would be both (1) discoverable in the foreign jurisdiction, and (2) for use in a tribunal proceeding that is already "pending." We reaffirm and elaborate that statutory analysis in Parts II and III below.

Before addressing the terms and history of the statute itself, however, we first address the comity issues raised both by Intel and by the European Commission as amicus curiae. The exact textual basis for their arguments differs, but that is secondary. The fundamental point is that no proper construction of § 1782 on *any* of the questions presented here

would raise a genuine issue of international comity. Accordingly, the comity concerns expressed by Intel and the EC should not undermine the straightforward statutory analysis set forth in Parts II and III. Neither should such concerns in any way affect the exercise of the district court's discretion to order discovery in this case, as we show in Part IV.

I. SECTION 1782 DOES NO DISSERVICE TO THE COMITY OWED TO THE EUROPEAN COMMISSION

A. Section 1782 Poses No Threat to the Commission's Leniency Program

Both in its brief in support of the petition and its brief on the merits, the EC expresses concern that treating the EC as a "tribunal" will imperil the Commission's Leniency Program. Indeed, this seems to be the Commission's principal institutional concern. With all respect to the Commission, holding that the EC is a "tribunal" for purposes of § 1782 will not portend disclosure of confidential EC filings.

It is important to be clear from the outset that this case does not involve any inquiry into any communication between Intel and the Commission, much less any communication under the Leniency Program. U.S. Br. 29 n.16; AMD Opp. Cert. 13. And even if there *were* a hypothetical possibility that, in some imagined future case, § 1782 might be used to seek access to Leniency documents, that would not justify distorting the statutory term "tribunal" to block the discovery of *any and all* documents that might be used to support a complaint made to the EC. On the contrary, the EC's legal obligation to receive and consider evidence submitted by the complainant, *see supra* at 13-15, implies a responsibility not to put unnecessary roadblocks in the way of a complainant's effort to seek the truth.

The Commission's fear is wholly unrealistic in any event. Section 1782 authorizes discovery only for "use" in a foreign proceeding. But if the documents sought are *already*

in the possession of the foreign tribunal, there would be no plausible basis for invoking § 1782 to obtain them. Leniency Program documents, of course, would already be in the possession of the EC. Accordingly, if the EC is held to be a "tribunal" under § 1782, there still would be no basis whatsoever under the statute for requesting Leniency Program documents, and thus no genuine risk that holding the EC to be a "tribunal" would expose such documents to disclosure.

Not only are Leniency Program documents by definition outside the ambit of § 1782, they are also privileged and therefore protected from discovery under the explicit terms of § 1782. *See* 28 U.S.C. § 1782(b). As the Commission itself has argued, Leniency documents "should benefit from the same protection granted to other law enforcement agencies under the 'law enforcement investigatory privilege.'" EC Pet. Br. 7. There is no basis for doubting the competency of the district courts to recognize and respect this Court's own judgment long ago that when wrongdoing is reported to a government agency, "such information, given by a private citizen, is a privileged and confidential communication . . . the disclosure of which cannot be compelled without the assent of the government." *In re Quarles*, 158 U.S. 532, 535-36 (1895); *see Arnstein v. United States*, 296 F. 946, 950-51 (D.C. Cir. 1924); *United States v. Deere & Co.*, 9 F.R.D. 523, 525 (D. Minn. 1949).[4]

B. Section 1782 Poses No Threat of Pretextual Complaints

The EC also worries that if it is treated as a "tribunal," complaining parties could circumvent important EC prohibitions against giving complainants access to the confidential business secrets of their competitors. EC Br. 13-14. Again,

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[4] It bears emphasizing as well that § 1782 is among the *least* plausible ways that discovery requests might be made for Leniency documents. The privileged character of those documents protects the Commission's interest in *all* discovery proceedings in the United States.

there is nothing to suggest that this concern speaks to any fact in the present record. U.S. Br. 29 n.16.

What is more, the EC policy concerning business secrets has no application to discovery rights in the United States. The EC policy applies solely to release *by the Commission* of information obtained in the exercise of its investigative powers. *See* Council Regulation 17/62, art. 20, 1959-1962 O.J. Spec. Ed. 87; EC Br. 13-14. As noted earlier, there would be no need to invoke § 1782 as to information already in the EC's possession. On the other hand, there is no law or policy imposing an obligation on the Commission to refuse documents that a complainant has obtained through valid legal processes. The fact that the Commission would not be free to disclose a certain kind of document does not mean that the European authorities intend to dictate to other nations how they should deal with business secrets. Indeed, the Commission's regulations make clear that the policy and obligation of the EC is to decide cases on their merits and, to that end, to receive and consider all evidence bearing on the merits. *See supra* at 13-15.

Relatedly, the EC fears that if § 1782 creates the opportunity for such access, it would "provide[] a powerful incentive to file pretextual complaints at the Commission." EC Br. 14. This concern is also unfounded. In the 40 years § 1782 has been on the books, there has been not the slightest hint that *any* proceeding has been commenced in *any* jurisdiction for the improper purpose of obtaining access to confidential information through § 1782. Moreover, even if there were a disposition to use § 1782 as a subterfuge for obtaining confidential information, there would be no need to rely on a proceeding in the EC to accomplish that purpose. A case under the competition laws of any foreign jurisdiction would provide a basis for invoking § 1782 that even Intel could not dispute. This has not been done because courts have applied § 1782 with circumspection, and because all

tribunals have means to protect themselves from misuse of their processes.[5]

Moreover, the contention that the EC may be overworked from pretextual filing reflects a misunderstanding of U.S. procedure. It would be pointless to file pretextual lawsuits with the EC (or any other tribunal) to obtain access to "business secrets" through § 1782. U.S. courts have ample experience with the protection of trade secrets, and ample means of assuring that the discovery process cannot be used for competitive advantage.

In short, far from encouraging pretextual complaints, § 1782 helps complainants to pierce through pretextual defenses and provides the Commission with better evidence on which to decide when a complaint has merit.

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[5] The EC, for instance, may reject a frivolous complaint at the outset, if the complainant has not provided sufficient factual support or has no legitimate interest in the alleged wrongdoing, or if the complaint does not implicate Community interest. *See* Notice on Complaints ¶¶ 28, 40, 47. Lawyers representing complainants before the Commission, of course, also have a professional duty not to abuse the Commission's processes with pretextual filings.

In addition to EC practice and procedure, there are significant U.S. deterrents to the abuse of § 1782 that concerns the EC. Rule 11 of the Federal Rules of Civil Procedure, for example, would authorize monetary sanctions for § 1782 applications based on exactly the kind of frivolous, pretextual filings the EC describes. *See* Fed. R. Civ. P. 11. (Rule 11(d) provides that such sanctions do not apply to discovery-related papers not filed with the court or to motions filed under Rule 26 through 37, but it does not exclude § 1782 applications.) The "tort of abuse of process" (Chamber Br. 14) could be invoked as well. As the Chamber of Commerce acknowledges, Rule 11 and tort remedies work successfully to "ensure that the discovery process is not employed frivolously." Chamber Br. 14. In short, *all* of the procedures that exist in U.S. civil litigation, as well as those available in the foreign jurisdiction, operate in the context of § 1782 to restrain the potential for abusive, pretextual filings.

C. Section 1782 Hazards No Threat of Offense To Foreign Sovereigns

In support of its separate argument that § 1782 should be interpreted to allow discovery only when the evidence sought would be discoverable in the foreign jurisdiction, Intel contends that "'foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws.'" Intel Br. 21 (quoting *In re Asta Medica S.A.*, 981 F.2d 1, 6 (1st Cir. 1992)). The EC's appearance as an amicus in this case might, at first glance, be taken as corroboration of that position. But as shown above, nothing in the record before this Court, the text of § 1782, or the history of its application, suggests any actual risk of the consequences cited by the EC. And in fact, the European Community, like the United States, favors disposition of complaints on the basis of the best evidence available: the EC relies heavily on evidence submitted by complainants, and is in fact required by law to accept and consider such evidence, even though the complainant cannot obtain such evidence though compulsory discovery in the EC proceeding itself. *See supra* at 13-15. Accordingly, once the EC's concerns about its Leniency Program and pretexual filings are laid to rest, the EC should take no offense at the submission of documents obtained through valid U.S. legal processes.

The fact that the EC does not give a complainant discovery rights, but does allow a complainant to submit evidence that must be considered by the EC, exemplifies the broader flaw in Intel's comity argument for a foreign discoverability requirement: it depends on the demonstrably false premise that the inability to obtain discovery in a foreign court *necessarily* "means that the foreign court objects to the inquiry." *Bayer*, 146 F.3d at 194. In truth, "there is no reason to assume that because a country has not adopted a particular discovery procedure, it would take offense at its use." *Id.* Such offense cannot be presumed because "[i]n many of such situations it may signify merely the unavailability of an ap-

plicable procedure." *Id.*; *see* U.S. Br. 24. Recognizing those points, the drafters of § 1782 specifically believed that "although a foreign court might not compel production of the evidence in the manner employed by an American court, it might very well, and ordinarily would, readily accept and rely on the evidence obtained with the help of the American court." Smit, *Recent Developments*, *supra*, at 236; *see*, *e.g.*, *Bayer*, 146 F.3d at 194-95. That is *exactly* the situation here: even though the EC does not allow AMD to compel production of the documents at issue, the EC will readily accept and rely on them, if they are submitted. The EC's own regulations and European judicial decisions require no less.[6]

In sum, this case does not threaten disrespect for the EC. AMD, of course, is not engaged here in a disinterested crusade to improve international judicial procedure. It is a complainant urgently seeking relief to which it believes it is entitled under EC law. It would make no sense for AMD to press for discovery that would offend the tribunal to which it must be submitted. AMD informed the Commission staff before filing this matter; and it has kept the staff informed at every step of the process. AMD has repeatedly offered to dismiss this proceeding if the Commission finds it offensive

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[6] And even where the foreign tribunal would *not* "readily accept" evidence obtained under § 1782, the drafters understood that the tribunal could fully ensure that proper results were reached in its proceedings simply by precluding the admission of the "extra" evidence produced under § 1782. *See* Smit, *Recent Developments*, *supra*, at 235-36 (drafters regarded foreign discoverability requirement "unnecessary" because "foreign courts could always rule on the propriety of reliance obtained [under § 1782] when it was presented to them"); *see also Euromepa*, 51 F.3d at 1101 (explaining that a foreign tribunal "can simply refuse to consider any evidence that [a party] gathers by what might be – under [foreign] procedures – an unacceptable practice" and thus "can quite easily protect itself from the effects of any [§ 1782] discovery order . . . that inadvertently offend[s] [foreign] practice"). Section 1782 need not be rewritten judicially to protect foreign tribunals from evidence the tribunals themselves are fully capable of excluding or ignoring if they wish.

or unconstructive, but AMD has never been asked to withdraw its § 1782 application – no doubt because AMD's quest does not conflict with European law or policy. The EC has raised concerns that are legitimate in the abstract – AMD has no wish either to undermine the Leniency Program or to encourage a welter of pretextual filings with the Commission – but they have no application either to this case, or to any realistic § 1782 scenario. The EC's concerns can be easily met by limiting § 1782 discovery to discrete materials relevant to the proceedings and excluding production of Leniency Program and other privileged materials. For over 40 years district courts have exercised their discretion prudently and there is no reason to doubt that they will continue to do so.

II. SECTION 1782 IMPOSES NO "FOREIGN DISCOVERABILITY" REQUIREMENT

"[I]mposing a requirement that the materials sought be discoverable in the foreign jurisdiction would be inconsistent with both the letter and spirit of the statute." *Bayer*, 146 F.3d at 192. And no less here than in respect to other statutes, courts "are not free to read extra-statutory barriers to discovery into section 1782." *In re Application of Gianoli Aldunate*, 3 F.3d 54, 59 (2d Cir. 1993).

A. The Text of § 1782 Includes No Foreign Discoverability Requirement

The text of § 1782 includes no hint that material may be produced only if it would be discoverable in the foreign proceeding for which it is sought. *See* U.S. Br. 21-22; *Bayer*, 146 F.3d at 192-93; *Gianoli Aldunate*, 3 F.3d at 58-59. The "statutory language is unambiguous in its requirements," and it "makes no reference whatsoever a requirement of discoverability under the laws of the foreign jurisdiction." *Gianoli Aldunate*, 3 F.3d at 58-59. "If Congress had intended to impose an additional element as restrictive as a requirement that the materials sought be discoverable in the foreign juris-

diction, it would have done so explicitly." *Bayer*, 146 F.3d at 193.[7]

Intel's only real *textual* argument for a foreign discoverability requirement is based the two sentences of § 1782 providing that a district court "may prescribe the practice and procedure [for discovery], which may be in whole or in part the practice and procedure of the foreign country or the international tribunal," and that if no specific procedure is prescribed, the Federal Rules of Civil Procedure govern. 28 U.S.C. § 1782(a).[8] According to Intel, these provisions establish that the material sought must be substantively discoverable under either the foreign jurisdiction's rules or under the Federal Rules of Civil Procedure. Intel Br. 24-25. But Intel simply misreads the statute: the sentences on which Intel relies plainly do not define the source of substantive rules for determining whether material is discoverable, but only the "practice and procedure" for taking whatever evidence is deemed to be discoverable. They do not speak at all to the question whether the material sought must be discoverable under either U.S. or foreign rules. *See* U.S. Br. 22

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[7] Section 1782's text also establishes affirmatively that it encompasses materials not discoverable in the foreign jurisdiction. Section 1782 specifically refers to discovery of witness "statements," even though "[u]nder the laws of many foreign countries, parties may not be heard as witnesses and party statements are not considered testimony." Smit, *International Litigation*, *supra*, at 1026. "By specifically referring to statements, Section 1782 makes clear that a district court may order that parties and other persons, whose statements do not qualify as testimony under foreign practice, may be heard." *Id.*

[8] Intel suggests two other ostensibly textual arguments for a foreign discoverability requirement, *viz.*, that the title's reference to "litigants" proves that actual litigants with discovery rights in a pending case may obtain discovery under § 1782, and that the example of "criminal investigations prior to formal accusation" added in 1996 proves the same point. Because these arguments actually relate only to Intel's theory that § 1782 establishes a *per se* bar to all "pre-litigation" discovery in all civil cases, we address them below in Part III, where we show that the statute decidedly does *not* limit § 1782 to "pending" cases in civil matters.

n.12 (sentences on which Intel relies "do not impose substantive restrictions on the discovery to be had, let alone create a *per se* foreign discoverability limitation").[9]

B. The History And Purposes Of § 1782 Preclude A Foreign Discoverability Requirement

Although the history and purposes of § 1782 are largely beside the point given the unambiguous text, the statute's background confirms that Congress did not intend to impose a foreign discoverability requirement precondition to relief under § 1782. *See Gianoli Aldunate*, 3 F.3d at 59 ("a literal reading of the unambiguous language of section 1782 comports with the purposes and legislative history of the statute"). Indeed, "a liberal intent to provide judicial assistance whether or not reciprocity exists has been acknowledged as a primary statutory goal since section 1782's inception." *Bayer*, 146 F.3d at 192 (internal quotation marks omitted).

As discussed above, it is widely recognized that § 1782 was driven by "twin aims": providing liberal discovery to those involved in tribunal proceedings in foreign jurisdictions, so as to encourage foreign jurisdictions to provide American litigants equally liberal access to documents abroad. *See supra* at 4-5 & n.1. Congress understood that those aims would be disserved by a rule that allowed "a request for cooperation [to] turn into an unduly expensive and time-consuming fight about foreign law." Smit, *Recent Developments*, *supra*, at 235. As Judge Calabresi has explained, a foreign discoverability rule would require "specu-

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[9] The sentences were added to cure a problem with § 1782's predecessor, which required that depositions be taken in accordance with American civil rules, which in turn conflicted with some foreign deposition-taking rules. The provisions on which Intel relies were added simply to ensure that district courts have authority to prescribe procedures – deposition-taking procedures, in particular – as needed to facilitate particular foreign requests. *See* Smit, *International Litigation*, *supra*, at 1028. They have nothing to do with the substantive rules for determining the discoverability of the evidence being sought.

lative forays into legal territories unfamiliar to federal judges," marked by "battle-by-affidavit" litigation over the testimony of international legal experts, with district courts laboring to "glean the accepted practices and attitudes of other nations from what are likely to be conflicting and, perhaps, biased interpretations of foreign law." *Euromepa*, 51 F.3d at 1099. Rather than open such a "Pandora's box" (*id.*) for every request for assistance from foreign tribunals and interested persons, Congress instead "authorize[d] discovery which, in some cases, would not be available in the foreign jurisdictions, as a means of improving assistance by our courts to participants in international litigation and encouraging foreign countries by example to provide similar means of assistance to our courts." *In re Order Permitting Metalgesellschaft AG to Take Discovery*, 121 F.3d 77, 80 (2d Cir. 1997). In short, "the drafters of § 1782 specifically intended no such [foreign discoverability] requirement to apply." Smit, *Recent Developments*, *supra*, at 229.[10]

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[10] Intel ignores the twin aims of the statute, and instead claims that the sole policy underlying § 1782 was to make the geographic location of a document irrelevant in international litigation. Intel Br. 24. Intel is wrong. Intel's theory is not based on any historical evidence of Congress's intent, but entirely on Intel's view that it would make "nonsense" of the statute if a party could obtain discovery of a document just because it is located in the United States rather than the foreign jurisdiction. *Id.* But the drafters did not think it would be "nonsense" at all if those involved in foreign litigation sometimes obtained more in the United States via § 1782 than they could abroad. To the exact contrary, as demonstrated above, such a result was specifically contemplated by the drafters, and was understood to be a direct result of the statute's *real* policy of providing broad discovery for use in proceedings foreign jurisdictions, to encourage those jurisdictions to provide broad discovery for American tribunals and parties. The drafters also believed that, as a general matter, foreign jurisdictions would welcome the introduction even of a non-discoverable document, and that if they did not welcome its admission they could simply exclude it, rendering the "extra" discovery not "nonsense," but simply ineffective in that instance. *See supra* at 12.

C. Intel's Policy Arguments Are Meritless And Misdirected

Essentially conceding that a foreign discoverability requirement cannot be found in the plain text of § 1782, Intel concentrates its energy on policy arguments. But as just discussed, the historical record makes clear that there are but two basic policies that motivated the drafting and enactment of § 1782, and they are served, not undermined, by the unambiguous absence of any foreign discoverability requirement in the statute. Intel's separate policy arguments do not and could not compel a result different from that dictated by the actual text and purposes of the statute.

1. Intel first worries that allowing discovery unauthorized by foreign discovery rules would place U.S. litigants in a "detrimental" position vis-à-vis opponents in foreign litigation, because a foreign party could obtain more discovery in the United States under § 1782 than the U.S. party could obtain in the foreign jurisdiction. Intel Br. 20-21 (citing *Asta Medica*, 981 F.2d at 6). The Second and Third Circuits have squarely addressed and rejected this concern. *See Bayer*, 146 F.3d at 194; *Euromepa*, 51 F.3d at 1102; *see also* U.S. Br. 24 ("Concerns about maintaining parity among adversaries in litigation . . . do not provide a sound basis for a foreign discoverability rule.").

First, this objection has no force at all when evidence is sought from a non-party in the United States, as § 1782 allows. *See* Smit, *Recent Developments*, *supra*, at 237. It makes little sense to impose a categorical statutory prohibition on the basis of a policy concern that does not even apply categorically.

Second, the view that a § 1782 request automatically leads to one-sided "unlimited discovery" reflects a serious misunderstanding of the statute. Nobody disputes that § 1782 "leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to

issue an order or may impose conditions it deems desirable." S. Rep. No. 88-1580, at 7; *see* Smit, *International Litigation*, *supra*, at 1029 ("In exercising its discretion, the court may not only refuse its assistance, but also may grant it upon such terms and conditions as it deems appropriate."). Forty years of experience demonstrate that district courts have never allowed §1782 applicants "unlimited discovery," and the record in this case confirms that there is no such issue here.

Experience thus demonstrates how easily "patent unfairness can be dealt with by the district court crafting an appropriate discovery order." *Bayer*, 146 F.3d at 194. For instance, if a foreign party seeks discovery under § 1782 from a U.S. litigant that the U.S. litigant could not obtain in the foreign party's home jurisdiction, the U.S. district court can simply "condition the assistance sought by the foreign party on [the foreign party's] making available to the American party [comparable discovery]." Smit, *Recent Developments*, *supra*, at 237; *see Euromepa*, 51 F.3d at 1102 ("if the district court wished to insure procedural parity . . . it could have conditioned relief upon the parties' reciprocal exchange of information"). Such a procedure is but one of many possible ways to avoid unfairness when a party seeks discovery under § 1782 that would not be allowed in the foreign jurisdiction. The point is that if there is any risk that a "blanket, 'American-style' grant of discovery to one side in a foreign lawsuit may confuse or skew th[e] litigation . . . it is far preferable for a district court to reconcile whatever misgivings it may have . . . by issuing a closely tailored discovery order rather than by simply denying relief outright." *Euromepa*, 51 F.3d at 1101.[11]

2. Intel also urges a distinction between requests made by foreign tribunals and those made by private persons: a

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[11] The magistrate judge in this case issued just this kind of tailored order, limiting AMD's discovery only to those documents likely to be most directly relevant to the EC proceedings.

foreign discoverability requirement may not exist when a request is made by a foreign tribunal, Intel acknowledges, but the requirement must exist when the request is made by a private party. Intel Br. 25. The problem, however, is that the requirement does not exist *anywhere* in the statute. Neither does any distinction between requests made by foreign tribunals and requests made by private "interested persons" – all are treated the same under § 1782's text.

But Intel is not deterred. It argues that when a foreign tribunal seeks discovery, the tribunal can be presumed to know what is discoverable in its own jurisdiction. Intel Br. 25. What this means, apparently, is that Congress would have thought it (a) unnecessary to state explicitly that a foreign discoverability requirement applies to requests from private parties (because the requirement so obviously would apply in that situation), and (b) unnecessary to state explicitly that the same foreign discoverability requirement does *not* apply to requests from foreign tribunal (because the requirement so obviously would not apply in that situation). The truth, of course, is that if Congress thought it important for a foreign discoverability requirement to exist *at all*, it would have written it into the statute; the *least* plausible scenario is that Congress would have relied on total statutory silence not only to establish such an important requirement, but also to create nuanced distinctions between private-party and foreign-tribunal requests. Yet that is exactly the scenario Intel imagines.[12]

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[12] Textual alchemy – creating something literally out of nothing – is not the only flaw in Intel's proposed distinction between requests from private parties and requests from tribunals. Intel forgets that many § 1782 requests come from foreign *officials* as "interested persons," who may be investigating serious criminal and civil offenses and may not *want* to be limited only to information they could discover in their own jurisdictions. Moreover, foreign prosecutors and civil investigators, no less than American prosecutors, may act more as advocates than as objective judges in describing what evidence is discoverable in their own jurisdictions. Either way, even if it made sense to read into the statute a

3. At the end of the day, Intel's – and even more clearly its amici's – arguments for reading a foreign discoverability requirement into § 1782, despite its total absence from the text, history and purposes of the statute, reduce to shop-worn complaints about the broad scope of discovery typically allowed under American civil rules. These arguments are misplaced for several reasons. First, the drafters of § 1782 were operating on the premise that discovery is *not* inherently evil, but in fact encourages accurate truthfinding by requiring up-front disclosure of all relevant facts. *See supra* at 6. Second, the international marketplace, and the inevitable disputes and litigation that arise out of that marketplace, have grown exponentially from the time forty years ago, when Congress thought the international economy was *already* important enough to ensure that American courts would provide liberal assistance to tribunals and others involved in international judicial and quasi-judicial proceedings. Third, district courts have the discretion to tailor discovery orders under § 1782 closely to the individual circumstances. Finally, objections to the fact that § 1782 does allow broader discovery where appropriate are not properly directed at the courts, but at the Congress that enacted the statute. It is particularly so here, inasmuch as Congress has repeatedly demonstrated its ability and willingness to revise § 1782 to meet changed circumstances. If the plain text of § 1782 now allows "too much" discovery, Congress can and

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conclusive presumption that foreign *tribunals* always assess with perfect accuracy the discoverability of evidence in their own jurisdictions, it makes no sense to apply that same presumption to foreign *officials*. Accordingly, under Intel's theory for why a foreign discoverability requirement should not be applied to foreign tribunals, such a requirement still should apply to foreign investigating officials. But hindering such investigators by imposing a costly and time-consuming foreign discoverability showing on them obviously would contravene the true comity purposes of the statute, demonstrating why Congress did not intend to impose any such requirement on *any* § 1782 applicant.

will revise that text. Until then, however, it is the obligation of the courts to apply the statute as Congress has written it.

III. AMD'S § 1782 APPLICATION SEEKS DOCUMENTS "FOR USE" IN A "PROCEEDING" IN A "FOREIGN TRIBUNAL"

Intel also argues that AMD's document request is outside the scope of § 1782 because it does not seek documents for "use in a proceeding" in a "foreign tribunal." This is quite incorrect. Regardless whether the EC is a "tribunal" for all purposes of *European law*, the EC plainly *is* a "tribunal" for purposes of *§ 1782*, because its proceedings result in a final decision on the merits of a complaint, determining the legal rights of a party, and possibly imposing penalties. But even leaving aside the question whether the EC itself is a "tribunal" during the investigative stage of those proceedings, what cannot reasonably be disputed is that the EC's current investigation will *result* in a "proceeding" in a "tribunal" – either the EC will issue a Statement of Objections and proceed against Intel, or it will not, in which case AMD has the right to proceed against the EC in the European courts. Nothing more is needed to show that the evidence sought is for "use" in a "proceeding" in a "tribunal."

A. AMD's Request Unambiguously Seeks Documents For Use In A "Proceeding" In A "Tribunal," Even If Such A Proceeding Is Not Currently "Pending"

The arguments of Intel and the EC that the Commission is not a "tribunal" *when it is investigating* miss a critical point: the EC *is* a "tribunal" when engages in the process of issuing a final decision against a party, and the European courts – to whom both Intel *and* AMD can appeal an EC decision going either way – are also "tribunals." Because AMD seeks documents for use in all these proceedings, AMD need not show that the current investigative stage of the proceeding is *itself* a "proceeding" in a "tribunal," as the decision below correctly recognized.

1. *The Current Investigative Stage Of The Proceeding Is Integrally Linked To Judicial Or Quasi-Judicial Hearings*

Regardless whether the current EC investigation is itself a proceeding in a tribunal, it will inevitably lead to a proceeding in a tribunal. As the court of appeals observed:

> A decision not to go forward [against Intel] would be appealable [by AMD] to the Court of First Instance, thus "leading to a judicial proceeding." A decision to proceed with a complaint would lead to hearings that are at least quasi-judicial in nature and then to an enforceable, judicially-reviewable decision.

Pet. App. 6a. Either way, "the investigation being conducted by [the EC's] Directorate is related to a quasi-judicial proceeding." *Id.* at 7a. None of this is in dispute. As the EC states: "No matter what action the Commission . . . takes on [DG Competition's] recommendation – whether it dismisses the complaint, or issues a decision finding infringement and imposing penalties as appropriate – that action is again subject to judicial review." EC Br. 7; *see supra* at 14-15. It is thus clear that no matter what course the EC's investigation takes, that investigation directly relates to a "proceeding" in a "tribunal." What the EC fails to recognize is that AMD seeks evidence "for use" in the inevitable judicial proceedings and at the only time when it is feasible under EC procedure to qualify such evidence for "use" in such proceeding.

As explained above, AMD has an express right to submit evidence to the EC in support of its complaint, and the EC has the legal obligation to consider such evidence in reaching its initial decision on whether or not to issue an SO. *See supra* at 13-15. Further, AMD is given the right to appeal a decision by the EC not to proceed, specifically for the purpose of allowing the European courts to ensure that the EC has fully investigated alleged wrongdoing and is adequately fulfilling its obligation to protect the European market from

barriers to competition. *Id.* Accordingly, regardless whether the EC itself is a tribunal at the current investigative stage of its proceedings, the evidence AMD seeks to submit is for "use" in a "proceeding" before a "foreign tribunal." But in that appeal the Court of First Instance can only consider evidence that was proffered to the Commission. If evidence is to be obtained under § 1782 "for use" in and by the European courts, in other words, it is *only* now, *before* the EC acts on the complaint, that such evidence may be obtained and submitted.

2. *Section 1782 Does Not Require That A Proceeding Be Currently "Pending"*

Intel's main response is that § 1782 does not authorize discovery for a "proceeding" that is not yet pending, even if such a proceeding is entirely inevitable. Pet. 13 ("Under the most natural reading, section 1782 authorizes civil discovery only if, among other things, a 'proceeding' is already underway before a foreign 'tribunal.'"); Intel Br. 27-33. This is wrong: the statutes that preceded § 1782 explicitly required that evidence be sought for use in "pending" judicial proceedings, and Congress intentionally deleted that requirement in the 1964 amendment.

a. Section 1782's predecessor statutes authorized district courts to order discovery of evidence for use specifically in "pending" suits or actions. *See* U.S. Br. App. 3a, 4a. The 1964 amendments deleted the word "pending" from the statute, and there is no evidence whatsoever that the deletion was inadvertent and thus inconsequential, as Intel suggests. Intel Br. 32-33. To the contrary, when "the legislature deletes certain language as it amends a statute, it generally indicates an intent to change the meaning of the statute." *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1154 (11th Cir. 1988); *see Stone v. INS*, 514 U.S. 386, 397 (1995). The legislative history amply confirms that strong presumption here: as contemporaneously reported by the drafter of the statute,

"the word 'pending' was eliminated to facilitate the gathering of evidence prior to the institution of litigation abroad." Smit, *International Litigation*, *supra*, at 1026 n.72. "It is not necessary . . . for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding." *Id.* at 1026; *see Crown Prosecution*, 870 F.2d at 687 (R.B. Ginsburg, J.); *In re Letters Rogatory from Tokyo Dist.*, 539 F.2d 1216, 1218 (9th Cir. 1976) (joined by Kennedy, J.); *accord In re Request for Int'l Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d 702, 706 (2d Cir. 1991); *Trinidad & Tobago*, 848 F.2d at 1155.[13]

b. This case illustrates the conundrum that would be created were § 1782 limited only to "pending" foreign cases. Commission rules give AMD the right to obtain and submit evidence in support of a complaint. But once DG Competition dismisses a complaint, judicial review of the decision is based on the record compiled by the EC, the complainant

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[13] Just as the statute includes no requirement that the proceeding be "pending," it includes no requirement that the proceeding be "imminent" in the sense that it will occur "very soon." *See United States v. Sealed I*, 235 F.3d 1200, 1205 (9th Cir. 2000) ("Focusing on the plain language of the statute, as we must, we note that the word 'imminent' does not appear. Surely, had Congress wanted to authorize assistance to foreign investigations only when foreign proceedings are imminent, it could have said so." (citation omitted)). The Second Circuit invented an "imminence" requirement out of whole cloth because the court was not sure "whether the deletion of 'pending' was intentional or inadvertent." *Brazil*, 936 F.2d at 705. The court agreed that it could not require that proceedings be pending, but it decided to impose a different – wholly nontextual – requirement of "imminence" on the statute, simply out of fear that "the deletion [of 'pending'] might have been inadvertent." *Id.* at 706. The court's "legislative accident" theory is indefensible, given that Congress is *presumed* to act intentionally when it deletes statutory language, *see supra* at 36, and given that there is unambiguous contemporaneous evidence that Congress *did* delete "pending" for the conscious purpose of facilitating discovery of evidence for use in proceedings that have not yet been instituted, *see supra* at 8.

and the target up to that point. If § 1782 is read as authorizing discovery only when a proceeding is "pending," and if the EC's current investigation is not such a "proceeding," then § 1782 discovery in support of an EC complaint becomes theoretically available only when it is too late for the evidence actually to be of use.[14] It is absurd to think that Congress wanted to preclude active participants in foreign tribunal investigations from obtaining evidence as part of a public investigation into wrongdoing, especially where – as here – the investigatory stage may be the only time such evidence could ever be obtained.

c. Intel nevertheless argues that the word "pending" must be read into the statute, because otherwise "there would be no logical stopping point to the speculative nature of the future 'proceeding' on which discovery does rest." Intel Br. 33. But again Intel simply ignores the text of the statute, which on its face limits discovery to evidence that is "for use" in a foreign proceeding. To show that evidence is actually "for use" in a foreign proceeding – and not merely to satisfy the applicant's curiosity – the applicant must show, as Justice Ginsburg has previously explained, that "the proceeding in the foreign tribunal and its contours [are] in *reasonable contemplation* when the request is made." *Crown Prosecution*, 870 F.2d at 687 (emphasis added). Phrased slightly differently, a court can be sure evidence is sought "for use" in a foreign tribunal proceeding when the court "satisf[ies] [itself] that a proceeding is very likely to occur." *Trinidad & Tobago*, 870 F.2d at 1156; *see also* U.S. Pet. Br. 17 (pending proceeding must be "integrally linked" to a judicial or quasi-judicial hearing). Thus, although a proceeding need not be "pending," under the statute "requests for infor-

[14] The same would be true even where the EC does proceed on a complaint. If the final, decisionmaking stage of its proceedings is the only point at which it becomes a "tribunal," then AMD – and the EC itself – could invoke § 1782 only when it is probably too late to provide assistance.

mation cannot be granted merely on the off chance or undocumented allegation that someday a judicial proceeding may follow." *Crown Prosecution*, 870 F.2d at 691 n.4.

Under the foregoing tests, this is an easy case. Certainly the actual pendency of a formal complaint to DG Comp is a "logical stopping point," because it is *only* during the investigative phase that the record can be made for judicial review. This is not a case of discovery aimed at a proceeding that may never be filed. There is a complaint on file, and the processing of that complaint is a necessary step in the process leading to a judicial or quasi-judicial proceeding. It is only when that complaint has been processed that the European courts can take cognizance of the evidence at issue. In authorizing discovery of materials for "use" in a foreign proceeding, Congress naturally intended to allow discovery at the time when such "use" would be possible.[15]

d. Contrary to Intel's submission, the reference to "litigants" in the *title* of § 1782 does not effectively substitute for the deleted word "pending" in the statute itself, limiting discovery only to "litigants" in "pending" proceedings. The title of a statute "cannot undo or limit that which the text makes plain." *Bhd. of R.R. Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 528-29 (1947); *see Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) ("[t]he title of a statute . . . cannot limit the plain meaning of the text") (internal quotation marks omitted). "For interpretive purposes, [the title is] of use only when [it] sheds light on some ambiguous word or phrase." *Yeskey*, 524 U.S. at 212 (internal quotation marks omitted). Here there is no "ambiguous

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[15] Reading the statute in accordance with its plain terms would hardly "open the statute to discovery requests in connection with virtually *every* administrative agency action . . . anywhere in the world," as the EC suggests. EC Br. 9. The EC points to no jurisdiction that affords a complainant such active, participatory rights in agency proceedings and subsequent judicial proceedings – the rights that ensure that the evidence AMD obtains will be "for use" in a "proceeding" in a "tribunal."

word or phrase" in the text; to the contrary, the statute includes numerous clear conditions on discoverability, and the pendency of a live proceeding is not among them. *See* U.S. Br. 19.[16]

The reference in the title to "litigants" on its face is merely a "short-hand reference" (*Trainmen*, 331 U.S. at 528) for the parties who may invoke § 1782, not substantive limitation on the scope of the statute. What the *actual statutory language* provides is that "any interested person" – and *not* just an actual "litigant" – may invoke the statute. As the United States explains, "[t]he words 'interested person' are broad and do not inherently require the applicant to be a 'litigant' in a traditional judicial forum. . . . As a textual matter, Congress could have, but did not, restrict discovery under Section 1782 to 'litigants' or 'parties.'" U.S. Pet. Br. 16. The legislative history confirms that Congress intended for "interested persons" to mean more than just "litigants": "A request for judicial assistance under the proposed revision may . . . be made in a direct application by an interested person, *such as* a person designated by or under a foreign law, *or* a party to the foreign or international litigation." S. Rep. No. 88-1580, at 8 (emphasis added).[17]

There is no serious argument here that AMD is not an "interested person" within the meaning of § 1782. AMD is

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[16] Intel argues that, as a matter of policy, § 1782 discovery ought to be categorically limited to "litigants" in "pending" cases because, Intel says, only "litigants" have an "obligation to plead a case that satisfies any standard of legal sufficiency." Intel Br. 36; *see* Chamber Br. 14. In fact, there are numerous requirements both here and abroad that preclude complainants from seeking § 1782 discovery in the absence of a legally and factually adequate complaint. *See supra* note 5.

[17] By citing in the legislative history *examples* of "interested persons" *such as* a person designated under foreign law *or* a party, Congress obviously did not mean to declare that *only* such persons could qualify as "interested" under the statute. Intel Br. 26. Rather, the statements "indicate[] that a 'litigant' is only one of a variety of 'interested persons.'" U.S. Br. 19.

fully recognized by the EC as a "legal person[] who claim[s] a legitimate interest" in the proceeding under Article 82 of the EC Treaty. *See supra* at 12; *see also* Notice on Complaints ¶ 36 (parties "can claim legitimate interest where they are operating in the relevant market or where the conduct complained of is liable to directly and adversely affect their interests"). EC law and procedure give AMD the right to submit evidence in the proceeding, the right to access the EC's file and to submit comments and objections should the EC preliminarily decide not to proceed against Intel, the right to seek judicial review of a final decision not to proceed, and the right to participate in the proceedings should the EC go forward. *See supra* at 13-15. That active, participatory role is easily "sufficient to qualify [AMD] as an 'interested person' within any reasonable conception of the term." U.S. Br. 20.

3. *Section 1782 Does Not Include A Hidden "Pending" Requirement Applicable Only In Civil Cases*

Finally, Intel argues that even if a "proceeding" need not be "pending" in *all* cases, it must at least be pending in all *civil* cases. Discovery of evidence may be ordered at the investigative stage of a proceeding, Intel contends, *only* in criminal matters. This is a most extreme position. As Intel candidly acknowledges, on its theory of § 1782, no civil administrative body in the world – *including the EC itself* – could obtain discovery under § 1782 at the investigative stage of its proceedings. Intel Br. 32.

There is not a whisper of affirmative evidence that Congress sought such a result. To the contrary, the Senate Report specifically describes Congress's intention to authorize discovery "whether the foreign or international proceeding *or investigation* is of a criminal, *civil, administrative, or other nature*." S. Rep. No. 88-1580, at 9 (emphasis added). More generally, it would be manifestly at odds with the statute's broader purposes of encouraging liberal assistance for "foreign administrative tribunal[s]," *id.* at 8, and thereby en-

couraging similarly liberal assistance for American investigating entities. Pursuant to those aims, Congress would have expected courts to apply § 1782 so as to encourage foreign nations to provide prompt assistance to American agencies conducting civil investigations. Congress certainly would not have expected § 1782 to be thrown up as a roadblock to the requests of a foreign judicial body or quasi-judicial, administrative entity, merely because the entity is investigating only civil misconduct and not criminal wrongdoing.

Intel's view contradicts not only the recognized purpose of § 1782, but also its enactment history. The original 1855 statute apparently allowed discovery to aid a foreign criminal proceeding, but the next four versions explicitly limited discovery to pending foreign *civil* actions. *See* U.S. Br. App. 3a. The 1948 version authorized discovery for use in "[a]ny civil action pending in any court in a foreign country." *Id.* at 4a. One year later, Congress revised it to replace "civil action" with "judicial proceeding," thus implicitly opening the statute to discovery in pending foreign criminal cases for the first time since 1863. *Id.* Then in 1964 Congress amended the statute again, more substantially; among other things, Congress deleted the word "pending" and replaced the phrase "judicial proceeding" with a "proceeding in a . . . tribunal." Thus in relatively short order Congress transformed the very limited phrase "*civil* action *pending* in any *court* in a foreign country" into the broader "proceeding in a foreign or international tribunal." The statutory changes were striking and fundamental: the "civil" limitation was gone, the "pending" limitation was gone, the "court" limitation was gone. But as Intel reads the statute, *all three terms were left in*: if it is a "civil" proceeding, it must still be "pending" in a "court." Such a reading makes no sense in light of the changes Congress made between 1948 and 1964. By eliminating the terms "pending" and "civil" in particular, Congress made clear that there would be no distinction between

civil and criminal proceedings, and no distinction between pending and future proceedings.[18]

Contrary to Intel's suggestion, the amendment to § 1782 *in 1996* cannot establish that Congress intended *in 1964* to retain a "pending" requirement, applicable only to civil cases, without saying so in the statute. *See Haynes v. United States*, 390 U.S. 85, 87-88 n.4 (1968) ("The views of a subsequent Congress of course provide no controlling basis from which to infer the purposes of an earlier Congress."). Nor does the 1996 amendment independently create such a requirement. That amendment added illustrative language providing that discovery may be ordered "for use in a proceeding in a foreign or international tribunal, *including criminal investigations conducted before formal accusation*." 28 U.S.C. § 1782(a) (emphasis added). Intel mistakenly reads this language as specifying the sole instance in which pre-litigation discovery is allowed. But the word "including" obviously is not a *limiting* term; rather it is used to introduce an *example* of what the statute covers. *See Chickasaw Nation v. United States*, 534 U.S. 84, 89 (2001) (interpreting

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[18] Intel's contention that § 1782 imposes a "pending" requirement in civil cases would also place § 1782 into conflict with the United States' obligations under the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The Convention sets forth the rights and duties of its signatories with respect to letters rogatory, and is set forth as a Note to § 1782's immediate neighbor, 28 U.S.C. § 1781. In Article One of the Convention, the United States (along with other signatory nations) agrees to accept letters rogatory in "civil or commercial matters," through which a judicial authority of another signatory nation may seek to "obtain evidence" for the use of the judicial authority. Such a letter, however, "shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or *contemplated*." In other words, letters rogatory *may* seek discovery of evidence for use in a "contemplated" "judicial proceeding," "civil or commercial." But if Intel's theory of § 1782 is correct, the district court categorically *cannot* order discovery in response to such a letter if it seeks evidence in a "civil matter" for use in a "judicial proceeding" that is only "contemplated," even though the Convention plainly authorizes such requests.

statutory list following word "including" as merely "illustrative"); *West v. Gibson*, 527 U.S. 212, 217 (1999) ("the preceding word 'including' makes clear that the authorization is not limited to the specified remedies there mentioned"); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 189 (1941) (to attribute restrictive meaning to "the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application"; "The word 'including' does not lend itself to such destructive significance."). Thus, as the United States explains, on its face the language Intel cites simply provides "an *example* of what is covered by discovery 'for use in' a proceeding in a foreign tribunal; it is *not*" – as Intel contends – "an exception to a general rule that the proceeding in the foreign tribunal must be underway." U.S. Pet. Br. 17 n.6 (emphasis added); *see* U.S. Br. 17.[19]

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[19] Intel also briefly refers to an entirely different statutory provision, 15 U.S.C. § 6203(a), in its effort to locate a "pending" requirement in § 1782 applicable only to civil cases. Intel Br. 32. Intel believes that reading § 1782 as authorizing foreign tribunals to obtain investigation-stage discovery would create a conflict with § 6203(a). But Intel simply misreads § 6203(a). That provision authorizes district courts to grant discovery to the U.S. Attorney General, if the Attorney General agrees to open a parallel antitrust investigation pursuant to a mutual assistance agreement. But if the foreign antitrust authority does not seek a parallel investigation or if Attorney General does not wish to open one, nothing in the text or policy of § 6203(a) precludes a foreign antitrust investigating official from seeking investigation-stage evidence directly under § 1782. There are several reasons a foreign authority might rather seek the investigative assistance of the Attorney General: American authorities may be more effective in obtaining evidence from American courts under § 6203(a), or American authorities may object to a wholly-independent foreign investigation into American persons or entities operating on American soil. A foreign antitrust investigating authority is, in theory, free to ignore those virtues and proceed directly under § 1782(a), but doing so may not be as effective and may risk future cooperation. The point, however, is that the text and policies of §§ 1782 and 6903(a) are easily harmonized.

B. There Is A Pending "Proceeding" In A "Tribunal" In Any Event

Although this Court need not decide the question whether the pending investigation is a "proceeding" in a "tribunal" to affirm AMD's right to discovery under the statute, the answer to that question is clear: the pending investigation *is* a "proceeding" in a "tribunal" within the meaning of the statute – in fact, the EC is *the archetypal* "tribunal" under the statute.

1. Section 1782's predecessor statutes had all limited discovery to use in foreign "courts." U.S. Br. App. 3a-4a.. In the 1964 revision, the term was changed to "tribunal" explicitly "to make it clear that assistance is not confined to proceedings before conventional courts." S. Rep. No. 88-1580, at 7. The term "tribunal" was employed to encompass "administrative and quasi-judicial proceedings," *id.*, and the drafters referred at the time *specifically* to the EC's Article 19, Regulation 17 proceeding – the EC proceeding for which AMD seeks use of the requested evidence – as *the* example of the kind of quasi-judicial proceeding to which the new § 1782 would apply: "New Section 1782 . . . permits the rendition of proper aid in proceedings before the EEC Commission in which the Commission exercises quasi-judicial powers, including proceedings under Article 19 of Regulation 17." Smit, *International Litigation*, *supra*, at 1027 n.73.

2. The EC's brief does not acknowledge the clear intent behind § 1782, but instead relies primarily on European authorities establishing that the EC does not adjudicate rights *between private parties*. EC Br. 7. This is beside the point: because "the Commission, like criminal and civil courts and other administrative agencies, can adjudicate disputes between the government and private parties," it "exercise[s] adjudicative functions and accordingly fall[s] within the reach of Section 1782." U.S. Br. 16. The EC does acknowledge that it engages in a decisionmaking function "in the last stage of the proceeding," but denies that this could render

that proceeding a "proceeding" in a "tribunal" under § 1782. EC Br. 9. But the EC's assertion is pure *ipse dixit* – it offers no reason or precedent under § 1782 suggesting that an agency that adjudicates the legal rights of a private party cannot be a "tribunal" under § 1782 simply because it investigates allegations before deciding their merits.[20] Nor is there a basis in precedent, practice or theory under § 1782 for distinguishing the investigative stage of a "proceeding" from a final decisionmaking stage.[21] As the EC describes its own proceeding, the "stages" are not distinct, but "blur" together (EC Br. 9), as the EC gathers evidence and builds a case against the target of the complaint, which is ultimately presented during the "last stage." To say that a foreign administrative agency is not a "tribunal" until it reaches some such last "stage" in its proceeding would be to bar such an agency from obtaining evidence under § 1782 until it reaches that stage – a point at which it may be too late for the agency to gather new evidence. Nothing in § 1782 suggests that Congress wanted to bar foreign administrative entities from using § 1782 to investigate the facts prior to initiating a case; as discussed, the exact opposite is true.

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[20] The EC's reasoning would mean that an entity like a grand jury is not a "tribunal," which contradicts both common sense and the specific intention of the drafters that § 1782 encompass proceedings before a *juge d'instruction*, the rough equivalent of a grand jury. Chamber Br. 5.

[21] The EC suggests that it is not a "tribunal" for purposes of *European law*, namely Article 6 of the European Convention on Human Rights ("ECHR"), which ensures defendants a hearing before an "independent and impartial tribunal." Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, art. 6. But the Commission's status under the ECHR says nothing about its status under *§ 1782*, a law enacted decades earlier by a different sovereign to serve entirely different purposes. Indeed, the European Court of Human Rights has held that the Belgian Cour de Cassation – the Belgian Supreme Court – does not satisfy ECHR Article 6, *see Coëme v. Belgium*, Nos. 32492/96, 32547/96, 32548/96, 33209/96 & 33210/96, E.C.H.R. 2000-VII, but presumably nobody would argue that the Cour de Cassation is not a "tribunal" under § 1782.

3. Finally, it bears emphasis that the EC's arguments, if accepted, would preclude not just the EC itself, but virtually any other foreign administrative agency in the world from obtaining evidence during a "pre-litigation" investigative stage. This Court cannot be assured that the EC speaks for all other foreign administrative agencies in seeking severe categorical limitations on foreign access to the valuable investigative resource promised by the plain text of § 1782(a). *See* U.S. Br. 30. This is yet another reason that, if the policy and comity concerns advanced by Intel and the EC *do* warrant some revision to the text of § 1782, that is a task that must be entrusted to Congress and the President.

IV. DISCOVERY SHOULD NOT BE DENIED AS A MATTER OF DISCRETION

For the reasons stated, § 1782 authorizes the district court to order the discovery AMD seeks. The final question is whether the arguments advanced by Intel and its amici justify denial of AMD's request as a matter of discretion, either through the imposition of general rules of judicial practice or by the individual exercise of discretion in this case. The answer on both counts is no.

First, it would makes no sense for this Court to impose, as general rules of practice, the selfsame foreign discoverability and pending proceeding requirements that Congress chose not to impose in the statute itself. The text of § 1782 reflects considered policy judgments by Congress, which has proven itself more than capable of revising § 1782 in response to perceived policy needs. Congress enacted the original predecessor to § 1782 in 1855, and revised the law in 1863, 1877 (with two statutes), 1948, 1949, 1964 and in 1996. *See* U.S. Br. App. 2a-5a. The Court should be all the more reluctant to revise Congress's work by imposing nontextual conditions on discovery here, given the foundations of § 1782 in the affairs of nations, as to which this Court typically defers strongly to the policy judgments of Congress. *See Haig v. Agee*, 453 U.S. 280, 292 (1981); *Zemel v.*

Rusk, 381 U.S. 1, 17 (1965); *Chicago & S. Airlines v. Waterman S.S. Corp.*, 333 U.S. 103, 112 (1948).[22] *See also* U.S. Br. 29 (listing "compelling reasons why this Court should decline" to state in this case "general rules to channel the district court's discretion").

Second, the comity concerns advanced by the EC do not justify denying AMD discovery in this particular case. The EC's brief addresses only the general scope of § 1782. Nowhere does the EC argue, or even suggest, that if § 1782 does apply in these circumstances, AMD should be denied discovery so that it cannot submit the *Intergraph* documents for the EC's consideration. Nor could the EC be read as even implying such a position, for it would be very much contrary to the EC's own obligations under European Community law and procedure. As discussed above, AMD has the legal right under EC procedures to submit whatever evidence it believes will assist the Commission, and the EC is required to consider such evidence during its investigation of AMD's complaint. *See supra* at 13-15. Notably, nowhere in its merits filing does the EC suggest that it will not use the requested evidence if submitted by AMD. The EC's arguments before this Court, in other words, do not suggest that, if AMD *does* have a right to seek discovery under the terms § 1782, the EC would object to AMD's submission of the Intel documents that are the subject of this application.[23]

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[22] By contrast, the "supervisory power" principle Intel seeks to invoke relates solely to "procedural rules *governing the management of litigation*." *Thomas v. Arn*, 474 U.S. 140, 146-47 (1985) (emphasis added). Section 1782 is not primarily a civil rule of evidence or procedure governing ongoing American litigation practice – as evidenced by the fact that the statute explicitly authorizes district courts to grant discovery in accordance with procedures *other* than those prescribed by the American civil rules. Section 1782 is not about *American* litigation; it is about providing discovery assistance for *foreign* proceedings.

[23] Thus, Professor Smit's comment that "an American court may properly take into account a foreign or international tribunal's ruling that the evidence sought should not be produced," Hans Smit, *American As-*

Indeed, if there were reason to think that the EC objected to AMD's specific request (as opposed to the language of the statute itself), that would only militate *in favor* of granting the request. As elaborated above, one of the main reasons European law allows a complainant such as AMD to participate in Commission proceedings is to help create a factual record so that the courts can tell whether the Commission has fulfilled its duty to protect the public from anti-competitive behavior. AMD's right to file an action in the Court of First Instance against the EC in turn enables Community courts to fulfill their own responsibility to oversee the EC. If the EC were read as signaling that it will not consider relevant evidence a party seeks to submit, it is all the *more* imperative that the record be completed so that the EC's decision can be properly reviewed by the Community courts. In that circumstance the evidence will be "used" by the courts, who would not necessarily share what has (incorrectly) been taken to be the EC's desire to preclude submission of evidence of Intel wrongdoing. In short, the more it appears that the EC will seek to block or ignore such evidence, the more valuable that evidence would be to the Community courts overseeing the EC, and thus the more important it would be to grant AMD's discovery request.

The situation is, in fact, already urgent. AMD's EC complaint has been pending for over three years. Its § 1782 request has been pending for more than two. The passage of time creates an increasingly pressing need for AMD to obtain the documents and submit them to the EC, because if DG Competition dismisses AMD's complaint, subsequent judicial proceedings will be based only on the record com-

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sistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited, 25 Syracuse J. Int'l L. & Com. 1, 13 (1998), has no application here: the EC has argued only that it is not a "tribunal" under § 1782; it has not (and could not have given its legal obligations) "ruled" that the particular evidence AMD seeks should not be produced for submission to the EC.

piled before the EC by the time of that action. Accordingly, if the EC dismisses the complaint without considering the *Intergraph* documents, neither AMD nor the courts will have the "use" of those documents in reviewing the EC's action. The district court must be allowed to exercise its discretion to order production as expeditiously as possible – discretion that should not be constrained by broadly stated EC policy concerns that do not even purport to question AMD's right under EC procedures to obtain and submit evidence in support of its complaint.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

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Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INTRODUCTION AND SUMMARY

Section 1782 was enacted to enable U.S. courts to assist foreign tribunals by removing jurisdictional barriers to discovery for use in the proceedings of those tribunals. Congress did not design this statute to create new discovery rights that would be unavailable both (i) in the foreign jurisdiction if the evidence, like the proceeding for which it is sought, were there rather than here and (ii) in this country if the predicate "proceeding" were here rather than there. As we and the European Commission have observed, construing section 1782 to subvert both foreign and domestic discovery norms in this manner would make nonsense of the comity purposes underlying this statute. That point is fatal to AMD's position, because it is undisputed that AMD would have no right to the discovery it seeks either (i) if the evidence in question were in Europe rather than the United States or (ii) if AMD had filed its antitrust complaint with U.S. authorities rather than with the EC.

AMD nonetheless asserts discovery rights on the ground that "the statute's *real* policy" is to "provid[e] broad discovery for use in proceedings [of] foreign jurisdictions, to encourage those jurisdictions to provide broad discovery for American tribunals and parties." AMD Br. 29 n.10. This is wrong on two levels. First, the purpose of section 1782 is comity, not "broad discovery" for its own sake. Comity requires the jurisdiction *from* which discovery is sought to honor the discovery policies of the jurisdiction *for* which it is sought, whether those policies are permissive or restrictive. In any event, even if Congress had designed section 1782 to serve as a model of expansive American-style discovery for foreign jurisdictions to follow, granting the discovery sought here could not serve that purpose either, because, as noted, no one disputes that even U.S. law would preclude such private-party discovery in connection with any analogous investigation in this country.

At bottom, AMD is left to argue that section 1782 opens a giant loophole that entitles private complainants to other-

wise universally unavailable pre-litigation civil discovery if, and only if, an investigation is pending in a foreign jurisdiction but the evidence happens to be in the United States. The text of section 1782 cannot plausibly be read to permit that absurd result, which would thwart the very comity goals on which the statute is based. At a minimum, the scope of section 1782 is ambiguous. That ambiguity is properly resolved by reference to the provision's title and legislative history, each of which confirms that the scope of beneficiaries excludes private non-litigants.

Ultimately, moreover, AMD's various arguments about the outer textual limits of section 1782 are irrelevant to the relief it seeks. Like other procedural statutes, section 1782 is subject to the development of general rules of practice designed to identify the recurring fact patterns in which a grant of discovery would either promote or harm the statutory objectives. Even AMD concedes that, because the statute speaks in terms of what the district courts "may" order, those courts have broad discretion to deny discovery requests that fall within the textual ambit of section 1782. The problem for AMD is that no one *except* AMD seriously suggests that granting AMD the discovery it seeks would be appropriate under these circumstances. The United States submits that "the particular characteristics of the request in this case weigh against granting the requested discovery[.]" U.S. Br. in Supp. of Cert. 18. Professor Hans Smit, whose post-enactment scholarship features prominently in AMD's brief although it does not qualify even as legislative history, has made clear that section 1782 discovery should be denied in precisely these circumstances—because, for example, the EC has jurisdiction over Intel and could force it to produce this discovery directly. And the EC itself devotes two briefs to why civil discovery by private non-litigants would be categorically inappropriate.

AMD accuses the EC of "put[ting] unnecessary roadblocks in the way of [AMD's] effort to seek the truth" and concludes that "the more it appears that the EC will seek to block or ignore such evidence, the more valuable that evi-

dence would be to the [European] Community courts overseeing the EC, and thus the more important it would be to grant AMD's discovery request." AMD Br. 20, 49. This position is as unsound as it is insensitive to the interests of the foreign sovereign for whose ostensible benefit AMD seeks this discovery. At bottom, AMD is asking this Court to usurp the role of the European courts and do what (by AMD's own account) those courts are unlikely to do: reverse the EC's prosecutorial judgments about what evidence to obtain in its antitrust investigations. But concerns about a foreign sovereign's compliance with its own law in its own forums can and should be addressed to the courts of *that* sovereign, not to the courts of this country.

In short, viewed from the perspective of whether discovery should ultimately be granted or denied, this is an easy case. But this Court can and should do more than simply remand to the lower courts in the expectation that they will agree that AMD has no plausible basis for discovery, given the considerations noted above. The Court should instead bring much-needed clarity to this area of law by adopting that conclusion itself—either as a matter of statutory construction or as a rule of practice.

ARGUMENT

I. THE TEXT, PURPOSE, AND HISTORY OF SECTION 1782 CONFIRM THAT CONGRESS DID NOT WISH TO CREATE NEW FORMS OF OTHERWISE UNAVAILABLE DISCOVERY.

1. AMD's brief is as notable for what it does not argue as for what it does. First, AMD does not deny that, if it had filed its antitrust complaint with U.S. antitrust authorities rather than with the EC, it would have no right to the documents it seeks here, for the familiar reason that U.S. law generally denies discovery rights to civil non-litigants. *See* Intel Br. 19-20. Second, AMD does not deny that EC law embodies a similar rule and that AMD would have no right to these documents if they were physically in Europe. The EC and the courts of the European Community have emphasized the importance of applying this no-discovery rule to the Commission's antitrust investigations, in part to

keep those investigations non-adversarial and to deter companies from filing complaints against their rivals as a pretext for document trawling. *See* Intel Br. 22-23, EC Br. 11-16. Third, AMD does not deny that the EC is perfectly capable of ordering Intel—as a party within its jurisdiction—to produce those documents on its own, without the assistance of U.S. law, and that the Commission has chosen not to do so.[1]

AMD compartmentalizes the issues in this case by separately analyzing whether section 1782 permits civil discovery (i) when such discovery would be barred by the foreign sovereign (AMD Br. 26-34), (ii) when the "litigation" for which it is ostensibly taken is neither pending nor imminent (*id.* at 34-39), or (iii) when it is requested by private non-litigants (*id.* at 39-41). As the issues arise in this case, however, these are just three ways of asking the same question. The reason AMD is a non-litigant is that no litigation is pending.[2] And the reason AMD could never obtain the dis-

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[1] AMD speculates that the EC declined to request the documents "perhaps because it lacked the resources to conduct a review of them" (AMD Br. 1) and that the discovery "could be of significant value . . . to the EC" (*id.* at 19). These statements are wholly without basis, and they fly in the face of the EC's own explanation that it does not "consider it necessary to request or even subsequently to review the documents" sought here. EC Br. in Supp. of Cert. 4.

[2] In its brief in opposition to certiorari, AMD acquiesced in Intel's observation that—as the Ninth Circuit itself had assumed (*see* Pet. 12, Pet. App. 6a)—the present first-phase investigation is not itself a "proceeding" before a "tribunal." AMD argued instead only that discovery is warranted under section 1782 if it could be used for a *future* adjudicative proceeding. *See* AMD Br. in Opp. to Cert. 16-19; *see also* Intel Reply Br. in Supp. of Cert. 3-4 (noting AMD's acquiescence); AMD Supp. Br. in Supp. of Cert. 4 (encouraging Court to grant certiorari and arguing, on the merits, that "no matter what the Commission in this case ultimately decides, the evidence AMD seeks to submit *will* be 'use[d]' in a 'proceeding' before a 'foreign tribunal'") (emphasis in original). AMD's acquiescence on this point was plainly material to the Court's certiorari decision, for otherwise this case would not present an opportunity to resolve the conflict between the Second and Ninth Circuits on whether a foreign proceeding must be at least "imminent" before a court may order section 1782 discovery. In the back pages of its brief (at 45-46), AMD now suggests for the first time that perhaps the current first-phase investigation may consti-

covery it seeks in the EC is similar to the reason it could not obtain such discovery in the United States had it filed its complaint with U.S. antitrust authorities instead: While government officials routinely take pre-litigation *criminal* discovery both here and abroad, U.S. law and EC law (as well as the law of virtually all other jurisdictions) preclude private non-litigants from obtaining *civil* discovery except in very limited circumstances that AMD does not invoke here. *See* Intel Br. 19-20 n.10. At bottom, the unitary question in this case is whether section 1782 opens an enormous loophole entitling civil non-litigants to otherwise *universally unavailable* discovery if they file their antitrust complaint in a foreign jurisdiction and the documents or persons at issue happen to be in the United States.

As we explain in our opening brief, reading section 1782 to create that loophole is absurd: Congress enacted that provision to reduce, not increase, the significance of geography in litigation with international aspects. AMD's only response is that "the statute's *real* policy" is not to remove jurisdictional barriers to the production of otherwise discoverable evidence, but to expand the scope of discovery *as such*, "to encourage [foreign] jurisdictions to provide broad discovery for American tribunals and parties." AMD Br. 29 n.10. This is untenable. The objective of section 1782 is not "broad discovery" for its own sake, but comity. And comity means that the tribunal from which discovery is sought should pay due respect to the discovery policies of the tribunal for which it is sought—whether those policies are broad or narrow. Intel's position, like AMD's, would thus "encourage" foreign jurisdictions to cooperate with U.S. courts and

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tute a "proceeding" before a "tribunal" after all. Any such argument is waived, for respondents were required "to point out in the brief in opposition, and not later, any perceived misstatement made in the petition," and defaulting on that obligation waives "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below." Sup. Ct. R. 15.2. In all events, the argument is frivolous on the merits for the reasons discussed in our opening brief (at 11, 28) and in the EC's brief on the merits (at 5-11).

litigants in providing discovery as broad as could be obtained under U.S. discovery principles. The difference is that Intel's position, unlike AMD's, recognizes the great affirmative value that many sovereigns place on enforcing prudent limitations on discovery. Intel's position honors those limitations; AMD's position would thwart them.

AMD thus falls back on the argument that the "purposes of § 1782 are largely beside the point" because, even if they support Intel's position, they are not reflected in "the unambiguous text." AMD Br. 28. But even AMD does not argue that the statutory language should be understood to generate open-ended discovery rights to the limits of textual interpretation. It concedes, for example, that the statute does not confer such rights on all non-litigants whenever they claim a need to take discovery "for use" in some speculative future proceeding. AMD submits instead that courts should inquire into whether such a "proceeding" is "'in reasonable contemplation.'" AMD Br. 38 (quoting *In re Letter of Request from Crown Prosecution Serv. of U.K.*, 870 F.2d 686, 687 (D.C. Cir. 1989)). But the "reasonable contemplation" standard appears nowhere in the statute, and there is no textual (or other) reason to prefer it to the Second Circuit's "imminence" standard. *See* Intel Br. 31-33. And the latter standard would sensibly bar discovery where, as here, there might never *be* a "proceeding" in which the discovery might be "use[d]"—because, for example, the complainant and investigatory subject may settle their differences privately or because the company dissatisfied with the EC's ultimate decision may elect not to appeal it.

Similar indeterminacy accompanies the statutory phrase "interested person." Here, too, AMD does not claim that the term should be inflexibly applied to its fullest literal meaning. That approach would imply, among many other things, that the target of a foreign criminal inquiry could *himself* invoke that investigation as a basis under section 1782 for seeking potentially exculpatory evidence in the files of private third parties long before criminal charges are filed. As in other contexts, where "'uncritical literalism'" in

interpreting a statute "offer[s] scant utility in determining Congress' intent as to the extent" of that statute, it is necessary to look to "'the objectives of the . . . statute as a guide to [its] scope.'" *California Div. of Labor Standards Enforcement* v. *Dillingham Constr. N.A.*, 519 U.S. 316, 325 (1997) (quoting *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U.S. 645, 656 (1995)). Just as it would defy the comity objectives of section 1782 to use it as a basis for entitling criminal suspects to otherwise unavailable pre-charge criminal discovery, so too would it thwart those objectives to use the statute as a basis for entitling private non-litigants to otherwise unavailable pre-litigation civil discovery.

At a minimum, the scope of section 1782 is ambiguous, and this Court should consult the legislative history and the statutory title—"[a]ssistance to foreign and international tribunals and to litigants before such tribunals"—for further guidance. *See, e.g.*, *Almendarez-Torres* v. *United States*, 523 U.S. 224, 234 (1998) ("the title of a statute . . . [is a] tool[] available for the resolution of a doubt about the meaning of a statute") (internal quotation marks omitted). Each confirms that Congress enacted section 1782 simply to assist the customary beneficiaries of compelled discovery in virtually any legal system: (i) sovereigns, tribunals, and their agents and (ii) actual litigants. Indeed, these are the only statutory beneficiaries ever mentioned in the numerous passages of legislative history addressing the scope of section 1782. *See* Intel Br. 26 & n.14.

AMD contends that Congress must have intended to confer discovery rights on unprecedented new classes of beneficiaries beyond these, relying again on Congress's use of the term "any interested person" to describe who may apply for discovery under section 1782. As we observed in our opening brief, however, Congress used the same term in a companion provision also enacted in 1964: 28 U.S.C. § 1696. That provision, which authorizes "any interested person" to apply for an order effecting "service" on a party in the United States, can apply *only* in connection with liti-

gation and can thus be invoked only by foreign tribunals or litigants. AMD makes no effort to square its argument with this embarrassing provision, and the United States consigns its own response to a footnote. *See* U.S. Merits Br. 20 n.11. Tellingly, the United States cannot cite a single real-world example to support the notion that section 1696 could conceivably apply outside the litigation context. That is no surprise because, as its title indicates, the purpose of section 1696 is to facilitate "[s]ervice in foreign . . . litigation" and, as the text further confirms, the provision can apply only "in connection with a proceeding in a foreign or international tribunal."[3]

The legislative history likewise demonstrates that Congress chose the term "interested person" in section 1782 merely to encompass the types of individuals who, in addition to litigants, enjoy traditional discovery rights both here and abroad: "A request for judicial assistance under the proposed revision may . . . be made in a direct application by an interested person, such as a person designated by or under a foreign law, or a party to the foreign or international litigation." S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3789 (emphasis added); *see In re Request*

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[3] AMD (but, notably, not the United States) claims that our position "would place § 1782 into conflict" with the Hague Evidence Convention (28 U.S.C. § 1781 note)—which, AMD suggests, contains an obscure negative implication that foreign "judicial authorit[ies]" might sometimes be able obtain discovery in the United States in "contemplat[ion]" of "judicial proceedings." AMD Br. 43 n.18. This argument lacks merit. First, there is nothing for any interpretation of section 1782 to "conflict" with, because the Convention "does not modify the law of any contracting state, require any contracting state to use the Convention procedures, either in requesting evidence or in responding to such requests, or compel any contracting state to change its own evidence-gathering procedures." *Societe Nationale Industrielle Aerospatiale* v. *United States Dist. Court for S. Dist. of Iowa*, 482 U.S. 522, 534 (1987). Also, even if the Convention specified mandatory rules, and even if AMD's strained construction of the Convention were correct, that construction would comport with our position because, again, it is commonplace for "judicial authorities" to obtain evidence in contemplation of future "judicial proceedings" in the criminal context.

for Assistance from Ministry of Legal Affairs of Trin. & Tobago, 848 F.2d 1151, 1154 (11th Cir. 1988). AMD claims that, by including the words "such as" in this passage, Congress signaled an otherwise concealed intent to create, through section 1782, new categories of discovery that would be unavailable to private non-litigants in any other context. AMD Br. 40. This is implausible. If those words come freighted with any significance at all, they mean only that section 1782 removes barriers to the production of evidence to sovereigns, officials, and litigants that would *have* discovery rights but for international jurisdictional obstacles. Neither in this nor in any other passage does the legislative history reveal any intent to confer new discovery rights on private parties that would otherwise lack them everywhere.

AMD's contrary position would also drain significance from the 1996 amendment, which provides that the set of foreign "proceedings" for which section 1782 allows discovery "includ[es] criminal investigations conducted before formal accusation." National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 186, 486 (1996); *see* Intel Br. 9, 25, 31. That clause would serve little purpose if, as AMD maintains, the rest of section 1782 were properly construed to permit pre-litigation discovery of all kinds, including the civil discovery sought here by a private party. Although AMD claims that the word "including" merely "introduce[s] an *example* of what the statute covers," AMD Br. 43-44, that point does not explain why Congress might have gone to the trouble of adding such surplusage to a supposedly clear statute. And the fact that Congress used the word "including" at the beginning of this new clause is at least as consistent with our position as with AMD's. Criminal investigations are the most obvious setting in which section 1782 allows discovery in the United States of evidence that would otherwise be available to government officials in the foreign jurisdiction, because pre-litigation criminal discovery is an international norm. By "including" such investigations within the broader scope of section 1782, Congress held open the possibility that foreign authorities could invoke the statute to obtain pre-litigation

discovery in civil law enforcement contexts as well if, as in the criminal context, such discovery would also be available to those authorities if it were within their jurisdiction. *See* Intel Br. 25 (discussing case law). But Congress did not signal any intent to create a new species of ubiquitously *unavailable* discovery for private non-litigants.[4]

There is likewise no merit to AMD's claim (Br. 42) that *Intel* has disregarded the significance of section 1782's evolution over time, including Congress's decision to provide discovery for the benefit of "tribunals" rather than just "courts" and the omission of the word "pending" in the completely rewritten version of the statute adopted in 1964. The sequence of statutory changes *does* show that Congress wished to accommodate requests by "investigating magistrates" (and similar officials and institutions) for *criminal* discovery before formal charges have been filed. *See* Intel Br. 5-9 & n.4. Again, however, Congress was simply removing jurisdictional barriers to the types of discovery that are routine both in the United States and abroad. Whereas pre-litigation criminal discovery is the norm around the world, civil discovery by private non-litigants is virtually unheard of. Nothing in these amendments suggests that Congress wrote section 1782 to change that convention; quite to the contrary, the 1996 amendment confirms that Congress in-

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[4] As we explain in our opening brief (at 31-32), AMD's position would likewise cast doubt on the significance of 15 U.S.C. § 6203(a), which grants pre-litigation discovery to foreign antitrust authorities *only* "[o]n the application of the Attorney General . . . in accordance with an antitrust mutual assistance agreement." Congress passed this provision in 1994. If section 1782 already entitled private non-litigants like AMD to obtain pre-litigation civil discovery, there would have been little need for section 6203(a), which permits such pre-litigation discovery—but only at the request of a foreign sovereign, with the approval of the Attorney General, and pursuant to a bilateral agreement. AMD suggests (Br. 44 n.19) that "American authorities may be more effective in obtaining evidence from American courts under § 6203(a)," but that is no answer. As the United States observes (*see* U.S. Merits Br. 1), foreign governments often enlist the aid of federal authorities in obtaining discovery under section 1782 itself, and a separate statute was unnecessary for that purpose.

tended to preserve it. AMD has no genuine response to this point.

2. AMD's extensive reliance on the pronouncements of Professor Hans Smit is as surprising as it is unavailing. As an initial matter, academic commentary is rarely advanced so aggressively as purported evidence of congressional intent, even when that commentary is written by a layperson who once played a role in the legislative process. The Second Circuit has thus correctly declined to "accept [Smit's] commentary as persuasive evidence of the meaning of the statute that Congress ultimately enacted" because, after all, "[s]taff members have ample opportunity to draft language that members of Congress may choose to use in committee reports and statutory text, but they may not elucidate congressional intent by bearing witness to congressional thinking." *In re Request for Judicial Assistance (Letter Rogatory) for the Federative Republic of Braz.*, 936 F.2d 702, 706 (2d Cir. 1991).

AMD's emphasis on Professor's Smit's section 1782 commentary is surprising for a second reason as well: Smit has himself explained that, on two levels, the precise type of discovery that AMD seeks would be inconsistent with section 1782. First, in Smit's view, section 1782 discovery should be limited to cases in which the person from whom discovery is sought is "a third party, not . . . a party, in the foreign proceedings. For assistance is needed only if the person who is to produce the evidence is not subject to the jurisdiction of the foreign or international tribunal. When that person is a party to the foreign proceedings, the foreign or international tribunal can exercise its own jurisdiction to order production of the evidence." App. 4a (¶ 14).[5] Here, of course, Intel, as the subject of the EC's investigation, is sub-

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[5] Professor Smit made these observations in a sworn declaration he submitted in connection with section 1782 litigation in *In re Ishihara Chem. Co.*, 121 F. Supp. 2d 209 (E.D.N.Y. 2000), *vacated*, 251 F.3d 120 (2d Cir. 2001). We have lodged that declaration with the Clerk of this Court and have reprinted it in the Appendix ("App.") to this brief.

ject to the EC's jurisdiction; the EC would be free to force Intel to turn over the documents at issue; and the EC has simply decided not to do so.

Smit adds in the alternative that, "even if it were assumed that Section 1782 were available to obtain evidence in the United States from a party in the foreign proceedings, a United States court should exercise its clearly prescribed discretion to deny an application made by the opposing party in the foreign proceedings. As a general rule, it would be improper to impose on a United States court a burden that should reasonably be that of the foreign tribunal." App. 5a (¶ 17). That outcome, Smit says, is necessary not just to effectuate Congress's true purpose in enacting section 1782, but also to avoid exposing U.S.-based companies to asymmetrically burdensome discovery obligations vis-à-vis foreign opponents in foreign tribunals. *Id.* (¶ 16). Our point is not to enlist Professor Smit's analysis *in haec verba* to our side of this dispute—the same outcome is more straightforwardly justified on the somewhat different grounds discussed above—but to put an end to AMD's curious supposition that Smit's commentary supports its position.

That commentary undermines AMD's position in an independent respect as well. Professor Smit has opined that, "when a foreign or international tribunal has ruled that production of the evidence pursuant to Section 1782 would not be appropriate, an American court should heed that ruling and deny the application." Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Com. 1, 14 (1998). Here, the EC has declined to order production of this precise evidence and has filed two amicus briefs stating that granting AMD discovery under section 1782 would "not be appropriate" (*id.*) because it would conflict with basic EC policy choices designed, among other things, to keep the Commission's antitrust investigations non-adversarial, to protect the integrity of its informal

consultations with private companies, and to preclude strategic behavior in the filing of antitrust complaints.[6]

3. AMD quarrels at length with the EC's policy reasons for opposing private discovery in connection with its investigations, but AMD's arguments on this point are irrelevant, unsound on the merits, and insensitive to the foreign authority for whose use it is supposedly seeking these documents. Compelling discovery for the ostensible benefit of an alleged "tribunal" that resists it would undermine, rather than promote, the comity interests on which section 1782 is based. As the United States recognizes, with considerable understatement, "the European Commission's assertions may provide a substantial basis" for denying discovery now that the EC is "clearly on record, through its amicus curiae briefs in this Court, that Section 1782's provision of judicial assistance may be inimical to its investigations." U.S. Merits Br. 28. And, if there were any doubt about the need to avoid granting discovery against the wishes of the very sovereign on whose behalf the discovery is purportedly sought, it should be resolved by the "strong presumption against any interpretation that undermines international comity." EC Br. 16. This Court has "long recognized the demands of comity in suits involving foreign states . . . as sovereigns with a coordinate interest in the litigation. American courts should therefore take care to demonstrate due respect . . . for any sovereign interest expressed by a foreign state." *Societe*

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[6] The considerations discussed in the text would logically lead Professor Smit to favor a denial of discovery here even though he once remarked—in one sentence of a footnote in a law review article—that section 1782 "permits the rendition of *proper* aid in proceedings before the EEC Commission" under Article 19. Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1027 n.73 (1965) (emphasis added), *quoted in* AMD Br. 7, 45. In all events, even if Smit's views on the meaning of section 1782 rose to the level of legislative history, which they do not, his one-sentence remark about the use of that statute in connection with EC investigations would be entitled to no weight, because he provides no analysis of the *characteristics* of such an investigation that are relevant to whether it can serve as basis for section 1782 discovery.

Nationale, 482 U.S. at 546 (citing *Hilton* v. *Guyot*, 159 U.S. 113 (1895)).

AMD criticizes the EC for "put[ting] unnecessary roadblocks in the way of a complainant's effort to seek the truth" (Br. 20) and ultimately falls back on the remarkable claim that "the more it appears that the EC will seek to block or ignore" the evidence AMD requests here, "the more valuable that evidence would be to the Community courts overseeing the EC, and thus the more important it would be to grant AMD's discovery request" (Br. 49). This argument is as implausible as it is brazen. AMD does not argue that the European courts will fault the EC for its decision not to order Intel directly to produce documents that the Commission deems immaterial to its investigation, let alone for the EC's opposition to AMD's efforts to short-circuit that decision through section 1782. To the contrary, AMD claims to need this discovery now precisely *because* it will be "too late" once any appeal is filed to review the EC's decision not to seek the discovery itself. AMD Br. 38. If that is correct, it can only be because the European courts wish to preserve the EC's discretion on discovery issues, and AMD has no business asking U.S. courts to force a contrary outcome on this foreign sovereign. Of course, if European courts *did* recognize a duty by the EC to obtain discovery in these circumstances, there would also be no need for intrusive intervention by U.S. courts, because on remand the EC would obtain the documents from Intel directly. Either way, it would offend basic principles of comity for the U.S. courts to insinuate themselves, at AMD's behest, into the relationship between the EC and the courts of the European Community.

In short, the "conundrum" about which AMD complains (Br. 37), like the "Catch-22" about which it complained at the petition stage (Br. in Opp. to Cert. 20 n.9), is no conundrum at all—and it is the consequence of European law, not of our interpretation of section 1782. The reason AMD has no right to these materials even though they are in the United States is the same reason it would indisputably have no right to these materials if they were in Europe instead: European

law attributes great value to the non-adversarial nature of the EC's investigations and gives the EC broad discretion to compile investigatory records as it sees fit. *See* Intel Br. 23-24; U.S. Br. in Supp. of Cert. 19 n.7. This Court is the wrong forum for the airing of AMD's contrary policy views.

II. THE COURT SHOULD ALTERNATIVELY EXERCISE ITS SUPERVISORY AUTHORITY TO MAKE CLEAR THAT DISCOVERY WOULD BE INAPPROPRIATE HERE.

AMD's position reduces to the claim that nothing in the text or legislative history of section 1782 directly forecloses the type of discovery it seeks. As we have shown, that claim is untrue. But even if it were true, it would not entitle AMD to that discovery. As AMD acknowledges (Br. 30-31), the terms of section 1782 are permissive, not mandatory, and the federal courts have broad discretion to deny discovery that falls within the literal scope of that provision. This Court should make clear that such discretion is properly exercised to deny discovery in either of two circumstances: (i) where a particular type of discovery would be unavailable in the foreign jurisdiction if the evidence were there and would be unavailable in the United States if an analogous investigation or proceeding were pending here or (ii) where the foreign sovereign has expressly opposed the grant of a particular type of discovery for its ostensible benefit.

1. Appellate courts, including this Court, have long played a critical role in developing rules of practice to guide the discretion of lower courts as they confront recurring fact patterns that arise from case to case. "[T]he courts of appeals have supervisory powers that permit, at the least, the promulgation of procedural rules governing the management of litigation. Indeed, this Court has acknowledged the power of the courts of appeals to mandate 'procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution.'" *Thomas* v. *Arn*, 474 U.S. 140, 146-147 (1985) (citation omitted); *see also Dickerson* v. *United States*, 530 U.S. 428, 437 (2000) ("This Court has supervisory authority over the federal courts, and we may use that authority to

prescribe rules of evidence and procedure that are binding in those tribunals."). Indeed, this Court has exercised such authority to limit not just procedural rights of the sort at issue here, but also the substantive rights of inmates to seek habeas corpus relief. *See, e.g.*, *Calderon* v. *Thompson*, 523 U.S. 538, 554, 559 (1998) (discussed in Intel Br. 35-36).

AMD nonetheless claims that the courts are powerless to deny its discovery request, reasoning that "[t]he text of § 1782 reflects considered policy judgments by Congress, which has proven itself more than capable of revising § 1782 in response to perceived policy needs." AMD Br. 47. This makes no sense. First, whether or not the text of section 1782 affirmatively forecloses AMD's discovery request, it surely does *not* reflect any "considered policy judgment" to give private parties expansive pre-litigation civil discovery rights that would otherwise be barred under both U.S. law and the law of the relevant foreign jurisdiction. And, although Congress is always "more than capable of revising" procedural and evidentiary statutes such as this one (*id.*), that is no reason for the courts to apply those statutes with senseless liberality in the meantime. If AMD means that courts must adopt a policy of maximal production, ordering whatever discovery might be found consistent with the broadest possible construction of section 1782, that argument runs headlong into AMD's own acknowledgement that the statute "'leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable.'" AMD Br. 30-31 (quoting S. Rep. No. 88-1580, at 7).

Finally, AMD suggests (Br. 47) that U.S. courts should reflexively grant section 1782 applicants as much discovery as possible, without meaningful limiting principles, "given the foundations of § 1782 in the affairs of nations, as to which this Court typically defers strongly to the policy judgments of Congress." But the cases upon which AMD relies—*Haig* v. *Agee*, 453 U.S. 380, 292 (1981), *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965), and *Chicago & Southern Airlines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112 (1948)—deal with the Court's

historic reticence to invalidate the policies of the federal government in "[m]atters intimately related to foreign policy and national security." *Haig*, 453 U.S. at 292. They have nothing to do with the need for the federal courts to develop rules for the sensible application of discovery statutes in recurring factual situations. And the fact that section 1782 involves "the affairs of nations" makes it all the more important for federal courts to heed the views of the foreign sovereign on whose behalf the applicant seeks discovery. As the United States explains, "the Commission's position [in this case] could properly lead United States courts to follow a general rule of declining to provide a form of assistance that the foreign tribunal does not want." U.S. Merits Br. 28.

2. In short, even if AMD's discovery request were not foreclosed by application of the normal tools of statutory construction, it still would be subject to a judicial inquiry into whether granting that request would serve the comity purposes of the statute. For the reasons discussed in our opening brief (and above), granting that request would in fact thwart those goals.

Indeed, outside of AMD's own brief, there is virtual unanimity on that point. The United States observes that "the particular characteristics of the request in this case weigh against granting the requested discovery as a matter of discretion." U.S. Br. in Supp. of Cert. 18. A broad cross-section of the U.S. business community has filed two amicus briefs expressing grave concern that AMD's position, if adopted by this Court, would expose U.S.-based firms to burdensome and potentially one-sided discovery obligations.[7] And, despite AMD's hair-splitting denial of the obvi-

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[7] *See* Br. of the Chamber of Commerce of the United States as Amicus Curiae in Supp. of Petitioner; Br. of the Product Liability Advisory Council, Inc. as Amicus Curiae in Supp. of Petitioner. The views of these two broad-based associations belie AMD's groundless suggestion (Br. 6, 29 n.10) that its expansive interpretation of section 1782 would somehow advance the interests of U.S.-based businesses. And, as we note in Section I.1 above, Intel's position, no less than AMD's, would serve the interests of U.S. companies seeking evidence *abroad* for use in the *United*

ous (*e.g.*, Br. 48), the EC explains at great length in its briefs why granting AMD's discovery request would subvert the comity principles underlying section 1782. In particular, it would "undermine the European Community's carefully balanced policies regarding the disclosure of confidential information," "encourage companies to file pretextual complaints with the Commission solely in order to use Section 1782," "wast[e] the Commission's scarce resources," "jeopardiz[e] the Commission's ability to maintain the confidentiality of documents submitted to it," and "greatly burden the Commission and other foreign sovereigns by requiring them to monitor and appear in district court proceedings throughout the United States in order to explain their interests in blocking such requests." EC Merits Br. 4-5.

Although the United States agrees that "reviewing courts have inherent supervisory authority to formulate rules of 'sound judicial practice'" to ensure national consistency in how district courts address "recurring fact patterns and issues," it nonetheless contends that "the Court should not attempt to develop any such rule at this juncture" and should instead await "the perspective and judgment of the lower courts that have practical experience in applying Section 1782 to specific factual contexts." U.S. Merits Br. 28-30. This reasoning is unsound on three levels. First, the lower courts have already gained considerable "perspective and judgment" in developing the limiting principles required by "practical experience" in dealing with section 1782 discovery issues. That is why the discovery sought here would be denied under the law of the First, Second, Fifth, and Eleventh Circuits. *See* Intel Br. 20-21 & n.11, 25, 30-31. And this Court presumably granted certiorari to resolve the conflict between the limiting principles adopted by those courts and the "allowance of liberal discovery" (Pet. App. 8a) favored by the Ninth Circuit.

States because, in that context, the relevant question under either approach is the scope of permissible discovery under U.S. law.

Second, discovery should be denied in this case not only because of the practical concerns expressed by the EC, but also because it would be *illogical*, as discussed above, to allow discovery that would be barred (i) in the foreign jurisdiction if the evidence were there and (ii) in the United States if an analogous investigation were pending here. This Court need not await further confirmation from the lower courts on that point of logic before concluding that it would disserve the statutory purpose to allow private parties to exploit section 1782 as a vehicle for circumventing otherwise ubiquitous limitations on pre-litigation civil discovery.

Third, such delay would come at a significant cost, for which there would be no countervailing benefit. As the EC explains (Merits Br. 17), there is "no system for providing [a foreign sovereign] with notice of Section 1782 cases" in the lower federal courts, "much less any regular procedure through which [it] might appear and make those interests known. More important, even if it were feasible for the [foreign sovereign] to appear in every such proceeding, that very notion—that a sovereign government should be obliged to appear regularly in courts across the United States to explain itself and its objections to Section 1782 discovery—is contrary to principles of comity."

There is no merit to AMD's suggestion that the federal courts are incompetent to discern the civil discovery limitations imposed by foreign jurisdictions—a position that AMD erroneously attributes to the Second Circuit. *See* AMD Br. 28-29. First, the Second Circuit itself has admonished that courts "must guard against an excessive reluctance to undertake the task of deciding foreign law, a chore [they] must often perform" in a great variety of contexts. *Manu Int'l, S.A.* v. *Avon Prods., Inc.*, 641 F.2d 62, 68 (2d Cir. 1981); *see also Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 798 (1993); *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 260 n.29 (1982).[8] Indeed, in the very case upon which AMD relies, the

[8] Adopted in 1966, Rule 44.1 of the Federal Rules of Civil Procedure (and its criminal analogue, Fed. R. Crim. P. 26.1), "substantially changed

Second Circuit reaffirmed that a "'grant of discovery that trenched upon the *clearly established* procedures of a foreign tribunal would not be within section 1782.'" *Euromepa S.A.* v. *R. Esmerian, Inc.*, 51 F.3d 1095, 1099 (2d Cir. 1995) (emphasis in original) (quoting *John Deere Ltd.* v. *Sperry Corp.*, 754 F.2d 132, 135 (3d Cir. 1985)). And it cannot be more "clearly established" than it is here that discovery would trench upon the discovery policies of the foreign authority, because in this case that authority has filed two briefs adopting precisely that position. Finally, even AMD does not deny that the discoverability of evidence in the foreign jurisdiction is at least *relevant* to a district court's discretion. For that reason, AMD's position, if adopted, would result in greater numbers of opportunistic section 1782 applications rather than fewer inquiries into foreign law.

CONCLUSION

The judgment of the court of appeals should be reversed.

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the manner in which federal courts are to treat questions of foreign law," *Twohy* v. *First Nat'l Bank*, 758 F.2d 1185, 1192 (7th Cir. 1985), such that questions about foreign law should now be "argued and briefed like domestic law." *Sealord Marine Co.* v. *American Bureau of Shipping*, 220 F. Supp. 2d 260, 271 (S.D.N.Y. 2002). The emergence of online legal databases such as Westlaw and Lexis has also made it much easier for federal courts to locate and apply foreign law. *See* Molly Warner Lien, *The Cooperative and Integrative Models of International Judicial Comity*, 50 Cath. U.L. Rev. 591, 628 (2001). For these reasons, adoption of a discoverability rule would not require courts "to master foreign law," for they "need only understand the basic principles of discovery in the relevant foreign system," and they could use the letter rogatory mechanism to resolve uncertainty "[i]n the rare case where this inquiry proves troublesome." *Id.*

Respectfully submitted,

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MARCH 2004

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

In re: The Application of Ishihara Chemical Co., Ltd., For an order to take discovery of Shipley Company, L.L.C., Pursuant to 28 U.S.C. § 1782	Misc. 99-232 (FB) Declaration of Hans Smit, Stanley H. Fuld Professor of Law, Columbia University

Hans Smit, a member of the Bar of the State of New York, on penalty of perjury, declares as follows:

I. QUALIFICATIONS

1. I am the Stanley H. Fuld Professor of Law and Director of the Center for International Arbitration and Litigation Law at Columbia University.

2. I obtained LL.B. (1946) and LL.M. (1949) degrees, with the highest distinction, from the University of Amsterdam. In 1953, I was a Fulbright Scholar at Columbia University, earning an M.A. degree. I obtained an LL.B. degree from Columbia University in 1958, graduating first in my class. At Columbia, I was designated a James Kent Scholar in all of my years, won various prizes, and was an editor of the Columbia Law Review.

3. In 1960, I joined the Columbia Law School Faculty. Before that time, I had practiced law in leading law firms in The Hague (now de Brauw & Blackstone) and New York (Sullivan & Cromwell).

4. I have, on a number of occasions, been a Visiting Professor of Law at the University of Paris I (Sorbonne), which, in 1990, awarded me an honorary doctorate. I created the Leyden-Amsterdam-Columbia Program in American Law at the University of Leyden and Amsterdam and the

Double Degree Program between Columbia and Paris I. I have been elected a member of The Netherlands Royal Academy of Arts and Sciences and was named a Knight in the Order of The Netherlands Lion by the Queen of The Netherlands. I attach my curriculum vitae as Appendix 1 to this Declaration.

5. At Columbia, I have taught civil procedure, conflict of laws, international law, international arbitration, and international business transactions. I have authored numerous law review articles and books. A summary thereof is attached hereto as Appendix 2.

6. I have acted as an expert on foreign law as well as American foreign relations law and conflict of laws on numerous occasions, in both federal and state courts. I have also acted repeatedly as an expert on American law in foreign and international tribunals. I have extensive experience as an arbitrator in international arbitrations. I am the Editor-in-Chief of The American Review of International Arbitration.

7. In June 1960, I was appointed the Director of the Project on International Procedure at the Columbia Law School. In that capacity, I also acted as the Reporter to the United States Commission and Advisory Committee on International Rules of Judicial Procedure (the "Commission"), bodies created by act of Congress and charged with the task of studying American rules relating to litigation with international aspects and of proposing appropriate legislative reforms. The Project, under a grant made by the Carnegie Corporation, assumed primary responsibility for conducting the appropriate studies and preparing proposed legislative reforms.

8. In my capacity of Reporter to the Commission, I analyzed existing rules, determined their deficiencies, and formulated proposals for reform. After having passed through drafting sessions with members of the Advisory Committee and members of the Advisory Committee of the Columbia Project, these proposals were submitted to the Commission, which, after making such changes as they

deemed appropriate, submitted them to appropriate legislative bodies—to wit, the U.S. Congress, the Commissioners on Uniform State Laws, and the Advisory Committees on Civil and Criminal Rules of Procedure of the Judicial Conference of the United States. All of these proposals are collected in *International Cooperation in Litigation: Europe* (Smit ed., published by M. Nijhoff 1965). I prepared the final versions of the proposals submitted to Congress. I also prepared the explanatory notes accompanying these proposals. All of our proposals were adopted by Congress without change.

9. Among the provisions of which I proposed reform was former Section 1782 of Title 28 of the United States Code. A detailed commentary on this Section was provided in the Explanatory Notes accompanying the version proposed to the Congress and in my articles in 65 Colum. L. Rev. 1015 (1965) and 69 Colum. L. Rev. 1264 (1962).

10. I have prepared this Declaration at the request of Pennie & Edmonds, LLP, counsel for Shipley, L.L.C. [hereinafter "Shipley"]. A copy of my Curriculum Vitae is attached as Appendix 1.

II. FACTS

11. I have reviewed the following documents submitted in this matter:

(a) an *ex parte* application for an order under 28 U.S.C. § 1782, dated October 26, 1999 [hereinafter "Application"];

(b) a memorandum in support of this Application, with a Declaration of Roger S. Thompson, dated October 26, 1999;

(c) this Court's Order, dated April 18, 2000, directing specified discovery; and

(d) a Declaration by Naoki Matsumoto.

III. QUESTIONS

12. I have been requested to address the following questions:

(a) does section 1782 cover the production of the evi-

dence sought,

(b) and, if so, should the Application be rejected in the exercise of the Court's discretion?

IV. OPINION

A. *The Principal Issues That Must Be Addressed*

13. The first question that arises is whether evidence can be obtained pursuant to Section 1782 from a party in the foreign proceeding. In addition, consideration must be given to the various elements of Section 1782. Section 1782 provides for the production of evidence "for use in a proceeding in a foreign ... tribunal." The evidence that can be obtained is "testimony or statement" or "a document or other thing." And, the U.S. court, "may," but is not obligated, to order the discovery. Each of these elements may be relevant in the present context.

B. *Section 1782 Does Not Authorize Obtaining Testimony Or Documents From A Party*

14. The purpose of Section 1782 is to provide American judicial assistance in procuring evidence in the United States from a third party, not from a party, in the foreign proceedings. For assistance is needed only if the person who is to produce the evidence is not subject to the jurisdiction of the foreign or international tribunal. When that person is a party to the foreign proceedings, the foreign or international tribunal can exercise its own jurisdiction to order production of the evidence. But because that foreign tribunal cannot exercise extraterritorial jurisdiction over non-parties in the United States, the assistance of United States courts is needed when the evidence is to be obtained from nonparties.

15. The Second Circuit has ruled that non-discoverability under foreign law does not necessarily preclude discovery in the United States. See *Euromepa S.A.* v. *R. Emersian, Inc.*, 51 F.3d 1095 (2d Cir. 1995); *In re Application of Aldunate*, 3 F. 3d 54 (2d Cir. 1993). This is so because our courts should not be forced to determine discoverability under foreign law when the foreign tribunal can itself

determine whether and to what extent the evidence produced may be used in its proceedings. But this is a question entirely different from whether production of evidence should be ordered in this country when the person that is to produce the evidence is a party in the foreign proceedings.

16. Granting judicial assistance for evidence from a United States company that is a party to a foreign proceeding is likely to be seriously disruptive to the proceeding. The American company would then be subject to the broad discovery that is generally available in the United States that is not available in the foreign tribunal, while his foreign opponent would not be subject to such discovery. In those circumstances, it is appropriate to have only the foreign tribunal determine whether and to what extent evidence can be obtained from the parties before it. To the same effect, see Smit, *American Assistance to Litigation in Foreign and International Tribunals*, 25 Syr. J. Int. L. & C. 1, at 11 (1998).

17. Indeed, even if it were assumed that Section 1782 were available to obtain evidence in the United States from a party in the foreign proceedings, a United States court should exercise its clearly prescribed discretion to deny an application made by the opposing party in the foreign proceedings. As a general rule, it would be improper to impose on a United States court a burden that should reasonably be that of the foreign tribunal. See Smit, *ibid.*

18. Imposing that burden on this Court in the case at hand would be particularly inappropriate, because the Japanese Patent Office has the authority under its own law to direct that Shipley produce testimonial and documentary evidence. See the Declaration of Naoki Matsumoto, paras. 5,6, attached as Exhibit D to Shipley's Memorandum in Support of its Motion. There is therefore no need for burdening this Court with what is within the proper authority and responsibility of the Japanese Patent Office.

C. *Section 1782 Covers Only Evidence Located in the United States*

19. I have earlier defended the view that Section 1782

covers only the production of evidence that is located in the United States. The production of evidence located elsewhere can be ordered only by courts that exercise jurisdiction there. This view was adopted by Judge Paterson of the Southern District of New York in *In re Application of Sarrio S.A.*, 1995 WL 598988. The Second Circuit, per Judge Leval, indicated his agreement with my view by stating that "there is reason to think that Congress intended to reach only evidence located within the United States" (119 F.3d 43 (2d Cir. 1997). Of course, this issue need not be reached if the Application in this case is rejected on the ground that Section 1782 does not authorize the production of evidence by a party to the foreign proceeding. But if this view is not adopted, the view that Section 1782 does not cover production of evidence not located in the United States requires that, in any event, the Application in this case be rejected insofar as it seeks production of evidence not located in the United States.

D. *Is the Japanese Patent Office "A Foreign Tribunal?"*

20. I have consistently defended the view that assistance under Section 1782 is available as long as the evidence sought is to be used in proceedings before a foreign body exercising adjudicatory authority. However, the Second Circuit has given the term "foreign or international tribunal" a much more limited construction. In *In re letters Rogatory Issued by the Director of Inspection of the Government of India*, 936 F. 2d 702 (1991), the Second Circuit, per Judge Friendly, ruled that the Indian Taxing Service, which had the authority to adjudicate tax claims, was not a "foreign tribunal" within the meaning of Section 1782. And in *National Broadcasting Co., Inc.* v. *Bear Steams & Co.*, 165 F.3d 184 (2d Cir. 1999), the Court held that an international arbitral tribunal, although undoubtedly exercising adjudicatory authority, was not a "tribunal" in the sense of Section 1782.

21. Clearly, the Second Circuit rulings are premised on a concern that the district courts not be burdened with providing assistance to other than judicial proceedings similar to their own. District courts do not provide assistance of the

kind here sought to its own Patent Office. The Second Circuit is most likely to regard it as improper to provide assistance to a foreign Patent Office that it does not provide to its United States counterpart.

E. *Is The Evidence Sought "For Use" In A Proceeding?*

22. Moved no doubt again by a desire to limit the burdens imposed on district courts, The Second Circuit has required that the proceedings be pending or imminent. See *In re Request for International Judicial Assistance for the Federal Republic of Brazil*, 936 F.2d 762 (2d Cir. 1991).

23. The documents submitted to me indicate that a substantial part of the evidence sought relates to a patent against which, for more than six months after Ishihara alleged that it would initiate such a proceeding, no proceeding has been instituted, and in fact may never be instituted. Under the Second Circuit's approach, the application, therefore should be rejected.

F. *Section 1782 Does Not Authorize Admission Requests Or Interrogatories*

24. Tellingly, Section 1782 does not mention "admissions" or interrogatories," which, under the Federal Rules, can be obtained only from parties. This confirms that Section 1782 focuses on obtaining evidence from non-parties. For if Section 1782 were intended to allow discovery from parties to a foreign proceeding, it would no doubt have expressly included admission requests and interrogatories.

25. Requests for admissions and interrogatories are not known in Japanese procedure (see the Declaration of Naoki Matsumoto, para. 4), nor, as a rule, in countries of the civil law tradition. It should not be assumed that Section 1782 seeks to introduce into foreign litigation procedural institutions that are unknown to it. Section 1782 should therefore be read as authorizing only what its clear terms convey and as contemplating only the giving of oral testimony or statements.

26. Consequently, the application, to the extent it seeks

admissions and interrogatories, is not authorized by Section 1782, even if it is assumed that Section 1782 authorizes judicial assistance in obtaining evidence from a party in the foreign evidence.

G. *The Court Has, In Any Event, Discretion To Deny The Application*

27. It is well settled that Section 1782, by use of the word "may," gives the court broad discretion in ruling on an application for assistance. The legislative history, the statutory text, the courts, and the commentators are in universal accord. See generally Smit, *International Litigation under the United States Code*, 65 Colum. L. Rev. 1015 (1965); Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S. Code Revisited*, 25 Syr. J. Int. L. & C. 1, 15 (1998). Indeed, the discretionary authority bestowed upon the court has been given specifically to enable it to determine, on a case-by-case basis, whether, and to what extent, it is appropriate to burden the American court with the task of directing the production of evidence to be used in foreign proceedings.

28. In the case at hand, even if the Application otherwise met the requirements of Section 1782, the following circumstances favor this Court's exercising its discretion to deny the Application:

(a) that Shipley is a party in the foreign proceeding and subject to the jurisdiction of that Japanese Patent Office;

(b) that the Japanese Patent Office has the authority to order the production of testimonial and documentary evidence itself;

(c) that the application seeks production of evidence that is not located in the United States and that is to be used in a foreign proceeding that has not been commenced;

(d) that the Japanese Patent Office is not a judicial body;

(e) that the application is clearly overbroad and, indeed, excessive;

(f) that issues of confidentiality and privilege can best be addressed in the foreign forum; and

(g) principles of due process which preclude an ex-party application. See, e.g., *Snaidach* v. *Family Finance Corp.*, 395 U.S. 337 (1960, Smit, 25 Syr. J. of Int. L. & C., at 16 (1998).

V. CONCLUSIONS

29. I therefore conclude that:

(a) no assistance under Section 1782 should be rendered when the evidence is sought from a party in the foreign proceeding;

(b) no assistance under Section 1782 should be rendered when the evidence is not in the United States;

(c) under controlling Second Circuit precedents, no assistance under Section 1782 should be rendered when the foreign proceeding in which the evidence is to be used is not pending or imminent;

(d) under controlling Second Circuit precedents, no assistance should be rendered under Section 1782 when the foreign proceeding is not before a judicial institution or a public body exercising equivalent authority;

(e) Section 1782 does not authorize admission requests and interrogatories;

(f) under Section 1782, this Court has clear discretion to reject the application;

Done, this 18th day of May, 2000

Respectfully Submitted,

/s/

Hans Smit
Stanley H. Fuld Professor
of Law Columbia University

HS:rmp

Supreme Court, U.S.
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No. 02-572

IN THE

Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* THE COMMISSION OF THE EUROPEAN COMMUNITIES SUPPORTING REVERSAL

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BRIEF OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3(a) on written consent of all parties, the Commission of the European Communities (the "European Commission" or the "Commission") hereby respectfully submits this brief as *amicus curiae*.[1] The Commission supports reversal of the decision of the United States Court of Appeals for the Ninth Circuit, *Advanced Micro Devices, Inc.* v. *Intel Corp.*, Pet. App. 1a-9a.

INTERESTS OF *AMICUS CURIAE*

The European Commission is the executive and administrative organ of the European Communities. The Treaty Establishing the European Community, 2002 O.J. (C 325) 33 (consolidated version), creates a unique tripartite structure in which the Commission is the institutional "Guardian of the Treaty," see *id.* at 119-20, art. 211, while the Council of the European Union represents the national governments of the Member States, and the European Parliament is directly elected by citizens of those Member States, see *id.* at 113, 117, arts. 189, 202. The European Court of Justice and Court of Auditors round out the Communities' key institutions. See *id.* at 126, 129, arts. 220, 246.

The Commission's responsibilities within this structure extend to a wide range of subject areas, including not only competition (antitrust) law, but also international trade, foreign aid, and environmental protection among other areas. Functionally, the Commission's role includes proposing

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[1] Pursuant to Supreme Court Rule 37.6, the Commission states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than the Commission or its counsel, made any monetary contribution to the preparation or submission of this brief. The parties' written consent to the filing of *amicus curiae* briefs is on file with the Court.

legislation, managing and implementing European Union policy and budgets, and representing the European Union on the international stage—including in contexts like this case, where the Commission's (and by extension the Communities') interests are directly at stake. In several areas, the Commission has been granted powers to enforce directly the Treaty and European regulations promulgated pursuant to it.

With regard to competition law and policy, the Commission, through the Directorate-General for Competition ("DG Competition"), enforces, *inter alia*, the Treaty's provisions relating to competition. These include in particular Articles 81 (relating to anti-competitive agreements, including cartels), 82 (relating to abuse of dominant position), and 87 (relating to market-distorting state aid). See *id.* at 64-65, 67. The Commission also has enforcement responsibilities under regulations such as the Merger Regulation, which provides for merger review.

The European Commission is taking the highly unusual (for it) step of appearing as an *amicus curiae* in this case because it is deeply concerned that 28 U.S.C. § 1782 ("Section 1782") could be interpreted and applied in a manner—like that embraced by the Ninth Circuit below—that would directly threaten the Commission's enforcement mission in competition law and possibly interfere with the Commission's responsibilities in other areas of regulatory concern as well. Far from its intended, laudable purpose of aiding the tribunals of foreign sovereigns, Section 1782 could become a threat to foreign sovereigns if interpreted expansively by this Court.

More specifically, the Commission perceives a serious threat to European Union competition law and policy and to the European Commission's ability to carry out its governmental responsibilities if Section 1782 is read (i) to treat the Commission as a "tribunal" in connection with competition law and other enforcement actions, and (ii) to delegate to district courts discretion merely to weigh the

Commission's interests in considering Section 1782 requests relating to such enforcement actions. Deeming the Commission a "tribunal" poses a serious threat to the Commission's law enforcement functions, in particular the operation of its cartel-related Leniency Policy. Leaving Section 1782 requests to a multi-factor balancing test within the discretion of district courts would place heavy and inappropriate burdens on the Commission and other foreign governments to monitor and appear in such actions to defend their sovereign interests on a case-by-case basis.

In the Commission's view, respectfully, such an interpretation would be misguided. An accurate understanding of the European Commission's nature and functions should rule out any application of the term "tribunal" to it, and principles of comity should guide the Court away from a freewheeling balancing approach and toward a bright-line rule. The Commission files this *amicus* brief in order to provide the Court with a fuller explanation of both.[2]

SUMMARY OF ARGUMENT

Section 1782 is intended to facilitate the collection of evidence in aid of proceedings before foreign tribunals, so that those tribunals can readily obtain the information necessary to carry out their adjudicative functions. However, no such proceeding before a "tribunal" was underway or forthcoming when Advanced Micro Devices, Inc. ("AMD") invoked Section 1782 to obtain discovery from its commercial competitor, Intel Corp. ("Intel"). The European

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[2] The European Commission wishes to be clear that this filing in no way reflects Commission support with respect to the merits of the underlying claims made by either party to this proceeding. Rather, it reflects the Commission's judgment that reversal of the Ninth Circuit's decision and appropriate limiting interpretations of Section 1782 are essential to the continued proper fulfillment of the Commission's enforcement responsibilities.

Commission is engaged in a preliminary investigation of Intel that was triggered by AMD's complaint alleging violations of European competition laws. But in that role, the Commission is not an adjudicative "tribunal"—it is an investigative entity fulfilling its responsibilities to enforce the competition laws in the public interest.

The European Commission respectfully submits that Section 1782 should be read to exclude discovery requests predicated on the Commission's investigation and evaluation of alleged infringement of competition laws. The nature of the Commission and its responsibilities make clear that the Ninth Circuit's characterization of its competition law proceedings as involving a "tribunal" cannot stand.

A contrary reading would have serious adverse consequences for the Commission, and thus should also be rejected in the interests of comity. Permitting discovery requests on the grounds endorsed by the court below would undermine the European Community's carefully balanced policies regarding the disclosure of confidential information, by allowing complainants to obtain via Section 1782 documents that they are not permitted to review under European law. Notably, the discovery sought by AMD is information that the Commission has thus far declined to seek on its own behalf. Such a rule could encourage companies to file pretextual complaints with the Commission solely in order to use Section 1782, wasting the Commission's scarce resources. In addition, characterizing the Commission as a "tribunal" poses serious threats to its anti-cartel Leniency Program by jeopardizing the Commission's ability to maintain the confidentiality of documents submitted to it.

In the Commission's view, it would not be appropriate to leave such concerns to be balanced by district courts in case-by-case evaluations of Section 1782 requests. Such an approach would greatly burden the Commission and other foreign sovereigns by requiring them to monitor and appear in district court proceedings throughout the United States in

order to explain their interests in blocking such requests. On the other hand, a proper, narrow construction of Section 1782 would avoid subjecting the United States' foreign policy partners to such burdens and indignities. This approach fully satisfies the manifest purpose of Section 1782 without needlessly interfering with the Commission's enforcement responsibilities.

ARGUMENT

I. THE EUROPEAN COMMISSION IS NOT A "TRIBUNAL" WITHIN THE MEANING OF SECTION 1782.

The parties have and will set forth legal arguments employing methods of statutory interpretation with respect to Section 1782. The Commission will not repeat those arguments here. Rather, it wishes to draw the Court's attention to an additional and independent interpretive question of special significance to it: whether the Commission can properly be designated a "tribunal" for purposes of Section 1782. The correct answer is no, and that answer requires reversal of the decision below.[3]

A. The Commission's Investigation Of Competition Law Complaints Is Not An Adjudicative Process.

Respondent AMD requested the district court's assistance in obtaining discovery from Petitioner Intel under Section 1782 on the premise that the documents sought were "for use in a proceeding in a foreign or international tribunal." The requisite "proceeding in a foreign ... tribunal," 28 U.S.C. § 1782(a), AMD contended, was the European Commission's investigation of Intel under Article 82 of the Treaty for

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[3] Likewise, of course, a determination in Intel's favor as to whether Section 1782 incorporates either a discoverability requirement or a "pending or ... imminent" proceeding requirement, Pet. i, would mandate reversal.

alleged abuse of a dominant position (a charge akin to a claim of monopolization under Section 2 of the Sherman Act, 15 U.S.C. § 2, in the United States). That investigation, in turn, had been automatically triggered by AMD's own filing of an Article 82 complaint against Intel, one of its chief commercial competitors. AMD encouraged the Commission to seek for itself the documents specified in AMD's Section 1782 request; the Commission, exercising its investigative discretion, has declined to do so.

Reversing the district court's refusal to issue the order sought by AMD, the Ninth Circuit held that the Commission's investigation constituted, or was at least "related to," a "'proceeding before a [foreign] tribunal'" within the meaning of Section 1782. Pet App. 7a. That holding, however, rests on a fundamentally mistaken—and potentially very harmful—understanding of the nature of the Commission's responsibilities in enforcing competition law.

The European Commission's overriding responsibility in this area is to conduct *investigations* into alleged violations of the European Union's competition laws. The Commission's staff (namely, DG Competition) may do so in response to a complaint like that filed by AMD, or it may do so on its own initiative. DG Competition may take into account information provided by a complainant, and it may seek information directly from the target of the complaint. See Council Regulation 17/62, art. 11, 1959-1962 O.J. Spec. Ed. 87. It is authorized, for example, to conduct "dawn raids," in which it enters and searches for information on the premises of the alleged infringer's business. See *id.* at art. 14.[4]

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[4] DG Competition's investigative powers will be further enhanced under a new "modernisation" regulation due to take effect May 1, 2004, that will replace and expand upon Regulation 17/62. DG Competition will have powers, for example, to interview individuals during inspections, to enter private homes, and to seal raided premises and books or records, as well as enhanced powers to impose fines for noncompliance with its investigations. *See* Council Regulation 1/2003, arts. 19-21, 23-24, 45,

Ultimately, DG Competition's preliminary investigation results in a formal written decision whether to pursue the complaint. If it declines to proceed, that decision is subject to judicial review. Should it pursue the matter further, DG Competition moves into a more formal investigative mode. Typically, DG Competition initiates proceedings by serving the target with a formal "statement of objections" that outlines DG Competition's preliminary views that infringement of the competition laws has occurred, and advises the target of DG Competition's intention—subject to hearing out the target—to recommend a decision adverse to it. If the target so requests, an independent hearing officer will hold a non-adversarial hearing to engage in further information-gathering from the target of the complaint, and will report his or her conclusions. See *id.* at art. 19; Council Regulation 2842/98, arts. 10-14, 1998 O.J. (L 354) 18, 21. DG Competition then faces another decision point—*viz.*, whether to recommend a finding of infringement against the target. No matter what action the Commission then takes on that recommendation—whether it dismisses the complaint, or issues a decision finding infringement and imposing penalties as appropriate—that action is again subject to judicial review.

What this process plainly reveals is that neither DG Competition nor the Commission as a whole is ever engaged in adjudicating rights as between private parties. It never performs the functions of a tribunal, because it never decides the merits of any dispute between the complainant and the target. The Commission's actions are directed against the target of its investigations, *i.e.* the addressee of the statement of objections and of any Commission decision. The complainant is not a party to the Commission's investigations. A complainant does have certain procedural

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2003 O.J. (L 1) 1, 14-18, 25. These features all reinforce the Commission's capacity to enforce the competition laws.

rights that give it an onlooker's role in the proceedings.[5] But the complainant does not have any right to confront the target, and the Commission does not act on its behalf. The limited, observer's role conferred on the complainant in no way marks the Commission's proceedings as adjudicative.

As the Court of Justice has explained, a Commission investigation "does not constitute an adversary procedure as between the [companies] concerned but a procedure commenced by the Commission ... in fulfillment of its duty to ensure that the rules on competition are observed." See Case T-65/96, *Kish Glass & Co.* v. *Comm'n of the European Communities*, 2000 E.C.R. II-1885, ¶ 33. The Commission acts solely to protect the public interest and solely to investigate and, as necessary, to enforce the competition laws. It is by assessing where the public interest lies that the DG Competition and the Commission decide at each step whether or not to proceed further with investigations and decisions.[6]

By far the greatest part of the Commission's activities, therefore, is not in any sense adjudicative. Rather, the Commission functions as an executive agency investigating and determining whether to initiate proceedings concerning a

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[5] For example, a complainant has opportunities to present information in support of its allegations, *see* Council Regulation 17/62, art. 19(3), 1959-1962 O.J. Spec. Ed. 87, as well as the right to seek judicial review of Commission decisions not to proceed with investigation or action on its complaint, *see* Case T-241/97, *Stork Amsterdam B.V.* v. *Comm'n of the European Communities*, 2000 E.C.R. 309, ¶¶ 51-53. The complainant does not, however, have access to confidential information. *See infra* at note 15.

[6] *See* Case T-24/90, *Automec Srl* v. *Comm'n of the European Communities*, 1992 E.C.R. II-2223, ¶ 85 (explaining that "unlike the civil courts, whose task is to safeguard the individual rights of private persons in their relations inter se, an administrative authority must act in the public interest. Consequently, the Commission is entitled to refer to the Community interest in order to determine the degree of priority to be applied to the various cases brought to its notice.").

violation of European competition law. Only at the very end of the process, when the Commission acts on DG Competition's final recommendation to abandon the investigation or to make a finding of infringement, does the investigative function blur into decisionmaking. But while the line between prosecutorial and adjudicative functions in the last stage of the proceeding may be less sharp than that which exists in United States practice,[7] that modest convergence in no way converts the Commission into a "tribunal" of the sort contemplated in Section 1782.[8]

Nor is the prospect of judicial review of the Commission's prosecutorial decisions sufficient to warrant Section 1782 discovery in connection with competition law investigations. To be sure, judicial review of decisions *not* to proceed with further investigation or prosecution is not familiar in connection with enforcement activities undertaken by United States agencies. See *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). But if that feature were sufficient for a Section 1782 petitioner to claim that discovery is "for use in a foreign ... tribunal," it would open the statute to discovery requests in connection with virtually *every* administrative agency action, regulation, investigation, license or permit anywhere in the world, so long as the action is ultimately subject to judicial review. Congress cannot have intended such an extreme result.

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[7] United States courts nevertheless have considerable experience in differentiating between prosecutorial and adjudicative functions and in wrestling with the consequences of governmental and quasi-governmental schemes that blur the two. *See, e.g.*, *Withrow* v. *Larkin*, 421 U.S. 35, 49-55 (1975); *In re Murchison*, 349 U.S. 133, 137-38 (1955).

[8] *See* Case T-11/89, *Shell Int'l Chem. Co.* v. *Comm'n of the European Communities*, 1992 E.C.R. II-757, ¶¶ 39-40 (holding that "the fact that certain Commission officials acted in the administrative procedure both as investigators and rapporteurs" [prosecutors] does not violate target's rights of defense; Commission is not a tribunal and its conduct is governed by appropriate regulations).

B. A Narrow Interpretation Of "Tribunal" Is Appropriate In The Section 1782 Context.

The Commission believes that the preponderance of law enforcement functions in its competition law responsibilities makes clear that it is not a "tribunal" within the meaning of Section 1782 and that the federal courts lack power to order discovery in connection with the Commission's activities. Indeed, that is also the conclusion of the European Court of Justice. See Case C-209/78, *Heintz van Landewyck SARL* v. *Comm'n of the European Communities*, 1980 E.C.R. 3125, ¶¶ 80-81 (holding that Commission in competition law investigation is not "tribunal" triggering rights for target under European Convention for the Protection of Human Rights).[9] In any event, even if there were any question as to the (in)applicability of the term "tribunal" to the Commission, the Court should construe that term restrictively.

That rule of construction is eminently appropriate in light of the historical roots of Section 1782. It is universally acknowledged that the intent of Section 1782 is to further international comity, and to inspire reciprocal assistance from foreign countries, by assisting foreign tribunals in developing the evidence needed to adjudicate disputes before them. See, *e.g.*, Pet. App. 8a; *Malev Hungarian Airlines* v. *United Techs. Int'l Ins.*, 964 F.2d 97, 100 (2d Cir. 1992). International law has long provided for the device of letters rogatory, or letters of request, from the courts of one country to the courts of another seeking their assistance in obtaining evidence for use in proceedings in the requesting courts. This practice, which originally depended solely on each country's courts' attitude of comity toward the courts of the other, see Lucien R.

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[9] Under that Convention, a hallmark of a "tribunal" is the separation of an adjudicative body from the executive. *See Heintz*, 1980 E.C.R. 3125, ¶ 80 (noting Commission argument that it cannot be a tribunal under Convention because Commission embodies, rather than being separate from, the Community's executive power).

LeLievre, *Address*, *in Letters Rogatory* 9, 10-11 (Bernard A. Grossman ed., 1956), has been codified in international agreements such as the Hague Convention on the Taking of Evidence Abroad,[10] and in domestic statutes like Section 1782. Section 1782 itself has been in existence in some form since 1855, see Act of March 2, 1855, § 2, ch. 140, 10 Stat. 630, 630.[11]

However, throughout this history—including in the liberalizing amendments that transformed Section 1782 into its current form—it has always been clear that the intent is to serve the interests of *adjudication*.[12] While the statute's present use of "tribunal" encompasses a wider range of entities than courts alone, Section 1782's deep roots in court-to-court practice should not be disregarded. Rather, the statute should be construed to be faithful to that purpose, by applying the term "tribunal" solely to adjudicative bodies and not to bodies, like the Commission, that are entrusted principally with investigative rather than adjudicative functions.

C. A Broad Interpretation Of "Tribunal" Is Affirmatively Harmful To The Commission's Sovereign Interests.

The term "tribunal" in Section 1782 should be read narrowly for practical as well as for legal reasons.

At the threshold, it is worth noting that such a reading in no way impairs the Commission's ability to carry out its

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[10] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444.

[11] *See also* Brian Eric Bomstein & Julie M. Levitt, *Much Ado About 1782*, 20 U. Miami Inter-Am. L. Rev. 429, 430-32 (1989) (recounting statutory evolution).

[12] *See* S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.C.A.N. 3782, 3788.

investigative functions. Other channels exist for the European Commission, as a governmental actor, to obtain information located in the United States if the Commission considers it necessary to do so. It is the Commission's clear preference, for example, to rely on the formal mechanisms that it has carefully negotiated with the United States specifically for the purpose of cooperation in competition law enforcement. The Community entered into a cooperation agreement in 1995 with the United States Department of Justice and the United States Federal Trade Commission to share information, including information about current enforcement activities, and to conduct parallel investigations, as well as a subsequent 1998 agreement deepening that cooperative relationship.[13] That cooperation is extremely effective in practice, as demonstrated, for example, by investigations coordinated among the Commission, the United States antitrust agencies, and even competition authorities in other countries.[14] Similarly, while the European

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[13] Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws, 1995 O.J. (L 95) 47, *as amended by* Exchange of Letters Dated 31 May 1995 and 31 July 1995, 1995 O.J. (L 132) 38; Agreement Between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, 1998 O.J. (L 173) 28. Even the Commission's filing of this brief will be the subject of an informational exchange between the Commission and the United States, pursuant to Article II(5) of the 1995 Agreement, 1995 O.J. (L 95) at 48.

[14] *See, e.g.*, Press Release, European Comm'n, MEMO/03/107, Spokesperson's Statement on Dawn Raids in the Copper Concentrate Sector (May 14, 2003) (describing raids coordinated with United States Department of Justice and Canadian Competition Bureau), *available at* http://www.europa.eu.int/rapid/start/cgi/guesten.ksh; Press Release, European Comm'n, MEMO/03/33, Statement on Inspections at Producers of Heat Stabilisers as well as Impact Modifiers and Processing Aids—International Cooperation on Inspections (Feb. 14, 2003) (describing raids coordinated with United States Department of Justice, Canadian

Union itself does not have one in place, several Member States have entered into treaties with the United States providing for mutual legal assistance in criminal matters, should alleged anticompetitive conduct rise to that level.

Far more important, however, is the very real risk that unless its preferred, narrow reading of "tribunal" prevails, the Commission's competition law enforcement programs will be placed in jeopardy.

First, the Commission objects to the potential subversion of limits that the European Union has imposed, in the exercise of its sovereign regulatory powers, on access by an antitrust complainant to the information that the Commission gathers in its investigation, including confidential business information of the target company. As a general rule, the Commission is bound by an obligation of confidentiality, as a result of which there are many elements of the Commission's files (including commercial information and business secrets) to which the complainant is denied access.[15] The Court of Justice has mandated in no uncertain terms that "a third party who has submitted a complaint may not in any circumstances be given access to documents containing business secrets."

Competition Bureau and Japan Fair Trade Commission), *available at* http://www.europa.eu.int/rapid/start/cgi/guesten.ksh.

[15] *See generally* Council Regulation 17/62, art. 20, 1959-1962 O.J. Spec. Ed. 87 (prohibiting disclosure). If the Commission dismisses a complaint, the complainant has access only to the non-confidential parts of the file on the basis of which the Commission rejects the complaint. If the Commission proceeds with a case, the complainant again has access only to a summary and non-confidential version of the statement of objections. *See also Heintz*, 1980 E.C.R. 3125, ¶ 46 (complainant's rights do not include right to receive confidential information); Case T-17/93, *Matra Hachette SA* v. *Comm'n of the European Communities*, 1994 E.C.R. II-595, ¶ 34 ("In particular, contrary to the applicant's contention, third parties cannot claim a right of access to the file compiled by the Commission on the same basis as the [companies] under investigation ....").

Case 53/85, *AKZO Chemie BV* v. *Comm'n of the European Communities*, 1986 E.C.R. 1965, ¶ 28.

As the Court of Justice explained, "[a]ny other solution would lead to the unacceptable consequence that [a competitor] might be inspired to lodge a complaint with the Commission solely in order to gain access to its competitors' business secrets." *Id.* Of course, a broad reading of "tribunal" in Section 1782 would directly undermine the Court of Justice's effort to protect the investigation process from abuse. Under the Ninth Circuit's decision, a complainant in Europe may use the Commission investigation that his complaint triggers to obtain access in the United States to confidential documents describing his competitor's business practices. This situation provides a powerful incentive to file pretextual complaints at the Commission, in order to be eligible to employ Section 1782—an incentive that is perhaps even more powerful than that feared by the Court of Justice in the European context, given the uniquely liberal discovery standards that govern in United States courts. Thus, deeming the Commission to be a "tribunal" for Section 1782 purposes not only facilitates circumvention of the European Union's considered policies on access to information, but also may cause a co-equal competition authority to waste precious time and resources on unfounded antitrust complaints. Indeed, those consequences are so grave that the Commission could be forced to rethink the very structure and future existence of the complaint procedure under European law. Comity is sorely lacking in such a scheme.

Second, the Commission is profoundly concerned that characterizing it as a "tribunal" within the meaning of Section 1782 will have adverse collateral consequences for its ability to protect its prosecutorial and law enforcement prerogatives in other proceedings. The European Commission has needed to invoke the law enforcement investigative privilege in civil actions in the United States to

protect from disclosure documents that it gathers in its antitrust law enforcement capacity.[16] Of paramount importance are documents submitted to the Commission under its Leniency Program by cartel participants who confess their own wrongdoing. If the Commission were deemed a "tribunal" in the competition context, it could find itself no longer able to guarantee the confidentiality of those Leniency Program confessions by, *inter alia*, resort to the law enforcement privilege wherever necessary. Companies make delicate balancing judgments in deciding to come forward under the Leniency Program, and any enhanced risk of public disclosure of their confessions will deter their participation. Section 1782 as read by the Ninth Circuit thereby threatens to undercut the effectiveness of the Commission's Leniency Program.

Third, there is no reason to believe that these adverse consequences of an overbroad interpretation of "tribunal" will be limited to the antitrust context. "Interested parties" who might benefit from fishing expeditions under United States discovery rules abound in Commission proceedings. For example, private industry complaints can also trigger Commission investigations in the international trade arena, such as in anti-dumping and anti-subsidy enforcement.[17]

In sum, vital Commission interests—in the protection of confidential information, in the rational deployment of its

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[16] *See, e.g., Amicus* Br. of the Comm'n of the European Communities at 7, *In re Vitamin Antitrust Litig.*, Misc. No. 99-197 (D.D.C. filed May 20, 2002); Letter from A. Tradacete, Director, DG Competition, European Comm'n to B. Amory, Counsel for Aventis (June 6, 2002), *filed in A.L. Gilbert* v. *Rhone-Poulenc S.A. (In re Methionine Litig.)*, No. 3:99cv3491, M:00-CV-1311 (N.D. Cal.).

[17] *See Twenty-First Annual Report from the Commission to the European Parliament on the Community's Anti-Dumping, Anti-Subsidy and Safeguard Activities*, COM (2003)481 final at 17-19 (outlining complaint and investigation procedures), *available at* http://trade-info.cec.eu.int/doclib/html/113638.htm.

competition enforcement resources, in the viability of its Leniency Program, and in the effective administration of other areas of Commission responsibility—are jeopardized by characterizing the Commission as a "tribunal" under Section 1782.

II. THE COURT SHOULD STRICTLY CONSTRUE SECTION 1782 TO AVOID INAPPROPRIATELY BURDENING THE COMMISSION AND OTHER FOREIGN SOVEREIGNS.

In the European Commission's view, a construction of "tribunal" that excludes the Commission necessarily follows from the nature of the Commission's responsibilities; in the event of any doubt, the serious adverse policy consequences noted above should weigh strongly in favor of that construction. However, the Commission anticipates an argument that the statute should not be interpreted to establish clear limits, and that concerns such as those expressed by the Commission are appropriately left for district courts to take into account in exercising discretionary authority to rule on Section 1782 requests. That is, some may argue against any clear, limiting interpretations (such as a narrow construction of "tribunal") that restrict resort to Section 1782 from the outset, and instead favor case-by-case assessments of the propriety of each Section 1782 request.

The latter approach, however, offends principles of comity by placing heavy and inappropriate burdens on foreign countries and their agencies. Where a statute implicates sovereign interests and is intended to foster international cooperation, it should be construed to further, not frustrate, those interests. Indeed, in construing a statute in this sensitive inter-sovereign context, the federal courts should apply a strong presumption against any interpretation that undermines international comity. See *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963) (favoring statutory construction that avoided disturbance in United States international relations and conflicts with

international and foreign law); cf. *Raygor* v. *Regents of the Univ. of Minn.*, 534 U.S. 533, 543-44 (2002) (requiring a clear statement to infer waiver of state sovereign immunity).

For two reasons, the case-by-case approach ill serves comity. First, a district court can only weigh fairly the complex interests of a foreign sovereign in aiding or blocking a Section 1782 discovery request if it is made aware of those interests. Private litigants cannot speak with authority to the policy interests of the European Commission. But so far as the Commission is aware, there is no system for providing it with notice of Section 1782 cases in which its interests are at stake, much less any regular procedure through which the Commission might appear and make those interests known. More important, even if it were feasible for the Commission to appear in every such proceeding, that very notion—that a sovereign government should be obliged to appear regularly in courts across the United States to explain itself and its objections to Section 1782 discovery—is contrary to principles of comity. And each adverse decision by an individual district court will be a potential irritant in relations between these important allies, and will risk interference with the normal conduct of international cooperation between the Commission and United States law enforcement authorities. Section 1782 applied in this fashion will promote international friction, not international comity.

Second, under the case-by-case approach, each of the scores of United States district courts will have discretion to conduct a balancing process to determine whether discovery is warranted in connection with a specific international proceeding. Each district court could develop its own approach, and each would be free to differ with other district courts with respect to both the appropriate balance in a given set of circumstances and the general rules to apply to the balancing process. The inevitable unpredictability and inconsistency simply exacerbate the problems already inherent in requiring a foreign sovereign to monitor United

States litigation to determine when it should appear and explain its interests in a United States tribunal. In this setting, clear rules are required.

Where two interpretations of a statute are available to it, the Court should favor the interpretation that does not offend the sovereign interests of the United States' foreign policy partners. Here, that interpretation—namely, that the European Commission in its antitrust capacity is not a "tribunal" on whose nominal behalf Section 1782 can be invoked—not only has clear factual and legal support, but also avoids a host of harms to the Commission and the competition law programs for which it is responsible.

CONCLUSION

For the foregoing reasons, *amicus curiae* the European Commission respectfully suggests that the decision below should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER[1]

INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 132 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 650 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is reproduced in Appendix A.

Because their products are sold throughout the world, many of PLAC's members (or their foreign corporate relatives) are subject to the product liability regimes of other countries. The past decade has seen a significant increase in product liability claims outside the United States, and future increases in foreign claims against American manufacturers seem inevitable. Accordingly, PLAC's members are particu-

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[1] The parties have consented to the filing of this brief; the written consents have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

larly susceptible to developments in the law that affect foreign litigation against U.S. companies.

In the decision below, the Ninth Circuit has held that 28 U.S.C. § 1782 may be employed by a private entity interested in a foreign proceeding to obtain documents that would not have been subject to production under foreign law had they been located within the foreign jurisdiction.[2] Unless the scope of discovery under Section 1782 is limited to comport with the practices of the foreign proceeding to which the application pertains, foreign applicants may be able to obtain expansive discovery from U.S.-based defendants when they are not subject to comparable obligations in the foreign proceeding. The one-sided imposition of U.S.-style discovery obligations will engender unfair results in individual cases and make U.S. companies the preferred targets of future litigation. If that occurs, foreign product liability laws will weigh more heavily on U.S. companies than on their foreign competitors, distorting the application of those laws and im-

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[2] The Ninth Circuit's decision to extend discovery under Section 1782 to a private entity claiming an interest in a non-adjudicatory, preliminary inquiry by a law enforcement agency also is of substantial concern to PLAC's members. Product safety is heavily regulated in many countries, and many foreign administrative agencies accordingly have the power to conduct inquiries into alleged product defects. See Christopher Hodges, *Multi-Party Actions: A European Approach*, 11 DUKE J. COMP. & INT'L L. 321, 342 (2001). Under the Ninth Circuit's approach, a private individual who professes an interest in such a proceeding might well be granted discovery rights under Section 1782, subjecting U.S. companies to pre-litigation "fishing expeditions" by potential foreign claimants. Because PLAC's members are more immediately concerned about the prospect that they will be subject to asymmetrical discovery obligations in foreign judicial proceedings, however, PLAC's amicus brief will focus primarily on the Ninth Circuit's rejection of a "discoverability" requirement.

posing competitive disadvantages on American manufacturers that sell their products around the world.

The background and history of Section 1782 establish that Congress intended to facilitate international litigation and encourage reciprocal action by other countries by making relevant documents available to foreign tribunals when the documents are located in the United States. Congress plainly did not intend to skew foreign lawsuits against U.S. defendants by making U.S. documents available for use in foreign proceedings when they would *not* have been discoverable under foreign law. Because the Ninth Circuit's decision will seriously prejudice all U.S. companies that are subject to suit in foreign countries, PLAC has a substantial interest in urging its reversal.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Ninth Circuit has held that a private entity claiming an interest in a foreign proceeding may obtain information from a U.S. defendant under Section 1782, even if the information would have been unavailable to the applicant had it been located in the foreign jurisdiction and sought in the foreign proceeding. Pet. App. 8a. If this Court adopts that view, its decision will encourage foreign plaintiffs to assert against U.S. defendants expansive discovery rights that their own legal systems do not provide. Thus, Section 1782 will become a vehicle for imposing asymmetrical discovery obligations on American companies involved in foreign litigation. Although foreign litigants will be able to assert broad rights to discover information located in the United States, U.S. defendants in these cases, restricted in most circumstances to the limited discovery allowed by foreign tribunals, will not be able to obtain similar discovery from their foreign opponents in litigation.

The Ninth Circuit's decision poses a substantial risk to U.S. manufacturers that are subject to the product liability

regimes of other countries. In the past ten years, many foreign countries have adopted new product liability laws based in strict liability, and foreign product liability litigation is on the rise. In comparison with the United States, however, other countries have maintained stringent limitations on pretrial discovery in product liability actions. This restrictive approach to discovery represents the judgment of those foreign legal systems as to the appropriate balance of benefits and burdens, including the extent to which litigation should be encouraged.

If this Court adopts the Ninth Circuit's construction of Section 1782, foreign restrictions on discovery will be easily sidestepped when U.S. manufacturers become defendants in foreign product liability actions. Already, foreign attorneys are becoming increasingly aware that Section 1782 can be used in certain U.S. courts to obtain expansive discovery not afforded by their native courts. If the Ninth Circuit's rejection of a foreign discoverability requirement becomes the law nationwide, American manufacturers defending product liability lawsuits overseas frequently will be subject to discovery obligations not shared by foreign parties to the same cases. The use of Section 1782 to grant one-sided discovery rights will unfairly distort foreign actions against U.S. companies and will make these proceedings substantially more burdensome for defendants, making it easier for plaintiffs to extract settlements even in insubstantial cases. Affording disproportionate access to the files of American manufacturers also will create special incentives to sue them, imposing costs on U.S. companies that are not borne equally by their foreign competitors.

The use of Section 1782 to impose asymmetrical discovery obligations on U.S. companies is inconsistent with the intent of Congress. Congress hoped to make the location of documents largely irrelevant to their discoverability in international litigation. It plainly had no wish to give foreign applicants employing Section 1782 more expansive rights to

discovery of U.S. documents than they would have if the documents were located in their home jurisdictions. Moreover, contrary to the Ninth Circuit's assertions, permitting discovery under Section 1782 without any regard to the discoverability of the material in the foreign forum is inefficient and will not encourage desirable reciprocal action by foreign governments. Finally, allowing applicants to employ Section 1782 to circumvent foreign restrictions on discovery may offend foreign tribunals and would unsettle carefully chosen foreign discovery practices.

ARGUMENT

I. FOREIGN PRODUCT LIABILITY ACTIONS ARE INCREASINGLY SIGNIFICANT TO THE OVERSEAS OPERATIONS OF U.S. MANUFACTURERS

A. Widespread Changes In Other Countries' Product Liability Laws Have Spurred An Increase In Foreign Product Liability Litigation

The United States has long had more intense and significant product liability litigation than other countries. Product liability claims in the U.S. began to skyrocket in the late 1970s and early 1980s. See George L. Priest, *The Current Insurance Crisis And Modern Tort Law*, 96 YALE L.J. 1521, 1533 (1987) (citing Justice Department report describing a 758% increase in federal product liability filings in 1974-1985). While the U.S. was experiencing what many called a product liability "crisis" (see, *e.g.*, Aaron D. Twerski, *A Moderate And Restrained Federal Product Liability Bill: Targeting The Crisis Areas For Resolution*, 18 U. MICH. J.L. REFORM 575 (1985)), product liability claims in other countries remained relatively rare. Accordingly, critics frequently observed that the tort system prevented U.S. manufacturers from competing effectively with foreign producers, which were free to develop new products and bring them to market in their home countries without incurring the costs of defending product liability claims. See Randolph J. Stayin, *The U.S.*

Product Liability System: A Competitive Advantage To Foreign Manufacturers, 14 CAN.-U.S. L.J. 193 (1988); Alfred Cortese, Jr. & Kathleen L. Blaner, *The Anti-Competitive Impact Of U.S. Product Liability Laws: Are Foreign Businesses Beating Us At Our Own Game?*, 9 J. L. & COM. 167 (1989).

Over the last decade, however, product liability litigation has become a more significant facet of business life outside the United States. Throughout Western Europe and elsewhere, foreign nations have been systematizing their rules governing product liability and making it easier for plaintiffs to establish a right to relief. See Marc S. Klein, *Megatrends In International Product Liability Law*, C949 ALI-ABA 113 (1994) (opining that "[s]ome major trading regions seem to be marching in the direction of American-style product liability law and litigation," and providing examples of recent developments in France, England, the Netherlands, Canada, and Japan). Thus, while two decades ago this Court observed that strict products liability remained "primarily an American innovation" (*Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 252 n.18 (1981)), today strict liability has been adopted by many of the U.S.'s major trading partners.

For example, in 1985, the Council of the European Community (EC) adopted a product liability directive requiring all members of the European Union to adopt uniform rules imposing strict liability on manufacturers of defective products. Council Directive 85/374/EEC, art. 4, 1985 O.J. (L 210) 29 (EC Directive). The Commission stated that the Directive had three goals: to harmonize product liability law in order to "equalize competition among the member states," "promote the free movement of goods," and "foster equal protection of the consumer." Kathleen M. Nilles, Note, *Defining The Limits Of Liability: A Legal And Political Analysis Of The European Community Products Liability Directive*, 25 VA. J. INT'L L. 729, 744 (1984-1985). As member countries enacted legislation implementing the directive between 1988 and 1998 (Christopher J. S. Hodges,

Product Liability In Europe: Politics, Reform, And Reality, 27 WM. MITCHELL L. REV. 121, 122 (2000)), commentators predicted that the new regime would produce a dramatic increase in product liability suits in the EU. See, *e.g.*, Ralph Atkins, *Consumers Given Sharper Clause*, FIN. TIMES, Feb. 29, 1988, at 4; Cathleen Ferraro, *Product Liability: Legal Overload Begs For Solution*, INVESTOR'S DAILY, Apr. 11, 1990, at 7.

In fact, in the wake of the Directive, there has been a steady increase in product liability litigation in EU countries. A major study of product liability litigation sponsored by the European Commission was published in March 2003. Lovells, PRODUCT LIABILITY IN THE EUROPEAN UNION: A REPORT FOR THE EUROPEAN COMMISSION (Feb. 2003). The study reported that the majority of the corporations, consumer groups, lawyers and other surveyed concluded that there had been "a noticeable increase in product liability claims in the EU over the past 10 years," while one-quarter of them believed that such suits had increased "a great deal." *Id.* at iv. Study participants also believed that product liability suits in the EU have become more successful and that out-of-court settlements have increased. *Id.*

Other nations also are adopting product liability regimes that are more favorable to consumers and are likely to encourage litigation. In 1994, for example, Japan replaced its old system with a new strict product liability statute that is much more favorable to consumers. Seizobutsu Sekinin Ho [The Product Liability Law], Law No. 85 of 1994. Although Japan has not yet seen an explosion of product liability litigation, the new law has encouraged more out-of-court settlement of product claims, a new emphasis on product warnings, more product recalls, and increased purchase of product liability insurance by Japanese manufacturers. See Jason Cohen, Note: *The Japanese Consumer Liability Law: Sending A Pro-Consumer Tsunami Through Japan's Corporate And Judicial Worlds*, 21 FORDHAM INT'L L.J. 108, 161-

168 (1997); Nancy Young, Comment, *Japan's New Products Liability Law: Increased Protection For Consumers*, 18 LOY. L.A. INT'L & COMP. L. REV. 893, 916-917 (1996). See also, *e.g.*, Gregory W. Fowler, INTERNATIONAL PRODUCT LIABILITY LAW: A WORLDWIDE DESK REFERENCE 154, 164, 308 (2003) (describing recent pro-consumer changes to the product liability laws of China, the Czech Republic, and Hong Kong).

B. Foreign Procedural Rules, Including Limitations On Discovery, Have Moderated The Effects of The Increasing Stringency Of Foreign Product Liability Rules

As the reforms discussed above have expanded manufacturers' potential liability for allegedly defective products, the legal systems within which the new rules operate have discouraged the filing of more dubious claims and have prevented the new rules from imposing excessive burdens on the manufacturing sector. See *Piper Aircraft Co.*, 454 U.S. at 252 n.18 (highlighting differences between U.S. and foreign legal systems); Alfred E. Mottur, Note, *The European Product Liability Directive: A Comparison With U.S. Law, An Analysis Of Its Impact On Trade, And A Recommendation For Reform So As To Accomplish Harmonization And Consumer Protection*, 25 LAW & POL'Y INT'L BUS. 983, 1005-1007 (1994). Of particular relevance here, most other countries have eschewed the expansive discovery practices that have been criticized as imposing excessive costs on defendants even when the plaintiffs' claims are meritless. See *Transcript of the "Alumni" Panel on Discovery Reform*, 39 B.C. L. REV. 809, 825 (1997-1998) (remarks of Mark Gitenstein) (referring to the feeling that, in the U.S., "big business defendants * * * are settling cases because of transaction costs driven by discovery").

With the adoption of the Federal Rules of Civil Procedure, the federal courts — followed by the many state courts

that model their own procedures on the federal rules — instituted a permissive approach to discovery that was virtually unknown elsewhere. See generally Stephen N. Subrin, *Discovery In Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002). The U.S. rules permitting broad discovery frequently have been abused by plaintiffs raising product liability claims. Even in the absence of evidence demonstrating that the product at issue imposed unanticipated risks or even injured the plaintiff, lawyers often are granted broad access to the manufacturer's internal files. They "eagerly seek internal research documents dealing with product development, particularly documents discussing any risk analysis performed on a particular product." Cortese & Blaner, *supra*, at 178. Although these risk evaluations may be "very misleading if taken out of context," they frequently are used "to prove that a product is defective and that the manufacturer knew it." *Id.*

At the very least, the existence of "bad" documents that might be misconstrued by a jury can be used to obtain substantial settlements. Indeed, even the threat of massive discovery can be enough to convince a defendant to settle. And even if a particular plaintiff's claim is denied before trial — for example, because he cannot establish that his injury was caused by the product in question — his lawyers can still exploit their investment of effort in the case by aggressively rounding up other plaintiffs alleging similar claims. Now "educated" by the discovery process regarding the development history of the product at issue, they can represent these new clients at relatively little incremental cost. Once other lawyers follow their lead, hundreds or thousands of similar filings can result, with claimants sometimes extracting substantial settlements before a single case comes to trial.

Other countries have taken a far different and more balanced approach to pretrial discovery that helps to discourage such tactics. In most civil law countries, party-driven pre-trial

discovery is either non-existent or very limited. David Epstein *et al.*, INTERNATIONAL LITIGATION: A GUIDE TO JURISDICTION, PRACTICE, AND STRATEGY § 10-03, at 10-4. (3d ed. 2000); see also, *e.g.*, Craig P. Wagnild, *Civil Law Discovery In Japan: A Comparison Of Japanese And U.S. Methods Of Evidence Collection In Civil Litigation*, 3 ASIAN-PAC. L. & POL'Y J. 1 (2002) ("Japan has no system of pretrial discovery equivalent to that of the United States."). For example, "[t]he basic principle of French civil procedure is that each party freely decides what evidence it chooses to produce." Fowler, *supra*, at 240. Similarly, "German civil procedure does not recognize pretrial discovery or depositions." *Id.* at 262. Italy is the same. *Id.* at 394.

In these countries, document production can be compelled only if the court or the party seeking production "already has positive knowledge of the existence of a specific document." *Id.* at 262. Broad requests for production of all documents relating to particular subject matter are not entertained. As two experts on French discovery practices wrote, "[w]hat the French fear most is not the revelation of damaging material but rather the occurrence of 'fishing expeditions,' that is, any request that is not for a clearly identified document." Vincent Mercier & Drake D. McKenney, *Obtaining Evidence In France For Use In United States Litigation*, 2 TUL. J. INT'L & COMP. L. 91, 118 (1994).

This form of discovery comports with these countries' methods of adjudicating claims. In civil law systems, judges rather than lawyers control the presentation of evidence, and "[t]he civil law judge's role is to decide the case on as limited an issue as necessary." Subrin, *supra*, at 301. Thus,

> [a]fter the pleadings * * *, the judge decides what evidence he or she needs and proceeds to request documents and interrogate witnesses in person. * * * He only explores what he thinks is relevant, and what he originally thought would decide the

> case turns out insufficient to the task, he turns to another avenue.

Id. at 301-302. The uniquely American method of discovery — under which the parties demand from one another all relevant information so that they may ultimately present their cases to the factfinder in an adversarial trial on all issues — plainly is not well-suited to employment in such judge-driven systems.

Common law jurisdictions such as the United Kingdom, Australia, and Canada do employ party-driven pre-trial discovery, but "the scope of United States discovery orders is unparalleled" even in these countries. Epstein, *supra*, § 10-3, at 10-4. Even so, to control what the government perceived to be runaway litigation costs, England recently amended its procedural rules in an effort to streamline, focus, and expedite discovery in civil cases. See Michael E. Stamp, *Are The Woolf Reforms An Antidote For The Cost Disease? The Problem Of The Increasing Cost Of Litigation And English Attempts At A Solution*, 22 U. PA. J. INT'L ECON. L. 349 (2001).

The limitations on discovery that other countries have elected to maintain weed out weak cases and reduce the transaction costs imposed by the cases that are filed. Without the promise of broad discovery, plaintiffs do not bring product liability claims in the hope of finding support by rummaging through the defendant's internal files, but hold their fire unless they believe they can prove by independent evidence that the product is unsafe. See Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1681-1682 (1997-1998) (describing understanding in non-U.S. common law jurisdictions that the plaintiff should have enough independent evidence to prove a *prima facie* case before filing suit, without needing any discovery). Furthermore, while in the U.S. discovery can be so burdensome and expensive that many cases are settled merely to avoid the transac-

tion costs, the more streamlined foreign proceedings may be defended on their merits without waste of resources.

II. THE OVERLY EXPANSIVE CONSTRUCTION OF SECTION 1782 WILL UNFAIRLY PREJUDICE AMERICAN MANUFACTURERS THAT ARE SUBJECT TO FOREIGN PRODUCT LIABILITY SUITS

U.S.-based companies already are disproportionately vulnerable to foreign product liability claims because the formidable American tort system creates "spin-off" lawsuits abroad. See, *e.g.*, Fowler, *supra*, at 380. If the Court sanctions the Ninth Circuit's overly permissive construction of Section 1782, this imbalance will become substantially more pronounced. The Court's decision will be a clarion call to foreign attorneys to use the provision to obtain expansive discovery against U.S. manufacturers. If that occurs, then U.S. companies that sell their products in other countries will uniquely be subject to *both* the expansive liability imposed by foreign substantive law and the burdens of broad, U.S.-style discovery that foreign jurisdictions have elected to avoid.

Already, foreign attorneys are becoming increasingly aware that Section 1782 is "a powerful * * * weapon in the arsenal of the non-U.S. litigant." Franklin B. Velie & Peter J. Gallagher, *Obtaining Information Located In The U.S. For Assistance*, THE WARSAW VOICE ONLINE: POLISH AND CENTRAL EUROPEAN REVIEW (Sept. 18, 2003), at http://-www.warsawvoice.pl/view/3496. See, *e.g.*, Richard H. Kreindler, TRANSNATIONAL LITIGATION: A BASIC PRIMER 154 (1998) (noting that, although Section 1782 "is over thirty years old, it has come into active use only recently"). Treatises on international litigation, foreign law journals, and foreign Internet sites are replete with "practice pointers" regarding the provision. See, *e.g.*, *id.*; Velie & Gallagher, *supra*; W. Cameron Beard, *Useful Tools For Collection Of*

Evidence In The United States In Connection With Norwegian Bankruptcies And Other Norwegian Proceedings: 28 U.S.C. § 1782 And 11 U.S.C. § 304, at http://konkursradet.no/art/?id=60; Steven R. Schoenfeld, *Securing Evidence In The United States Under 28 U.S.C. Section 1782 For Use In Canadian Proceedings* (Sept. 12, 2003), at http://www.torys.com/publi-cations/index.html; Ronald Blum & Peter Ball, *American Courts In Aid Of Foreign Litigation – Discovery In The United States By Litigants In Proceedings Outside The United States*, INT'L CO. COMM. L. REV. 1998, 9(5), 146-149.

The authors of these materials emphasize that, in some U.S. courts, Section 1782 "can be used * * * to obtain U.S.-style discovery for non-U.S. proceedings in which such discovery might not normally be possible or permissible." Kreindler, *supra*, at 174; see also W. Cameron Beard, *supra*, at http://konkursradet.no/art/?id=60#24 ("In more liberal circuits, it is possible to obtain an order directing an individual or corporate entity to produce documents without reference to the strict requirement of specificity (spesifikasjaonskravet) that would control document production under Norwegian law."). These commentators even note the value of "forum-shopping" within the United States to obtain the broadest possible discovery. Kreindler, *supra*, at 154.

If the Ninth Circuit's position becomes the law nationwide, U.S. manufacturers will suffer significant disadvantages when they become defendants in foreign product liability suits. Foreign litigants (and even persons who are not parties to *any* judicial proceeding and hence are not subject to *any* discovery themselves) will be able to obtain broad access to U.S. documents under Section 1782, but will not be subject to equivalent discovery in their home courts. This one-sided employment of "American-style discovery" will "skew foreign litigation" against defendants whose records are located in the United States. *In re Application for an Order Permitting Metallgesellschaft AG to Take Discovery*, 121

F.3d 77, 80 (2d Cir. 1997); see also *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 6 (1st Cir. 1992) (rejecting Ninth Circuit's construction of Section 1782 on the basis that it would "allow a litigant to use United States law to gain an unfair advantage over its adversary in a purely foreign litigation").

The unfairness of employing one-sided discovery in a product liability action is obvious. For example, in France (as in other countries that have adopted the EC product liability directive), a component manufacturer is jointly and severally liable for product defects with the manufacturer of the finished product, unless the component manufacturer can prove "that the defect was caused by the design of the product into which the component was integrated." Fowler, *supra*, at 243. Imagine, then, that a U.S. company manufactures and exports a product containing German components, and that both the U.S. company and the German component manufacturer are sued in France. The component manufacturer would be able to seek expansive discovery in the U.S regarding the design of the finished product, but the U.S company — confined to restrictive French discovery procedures — might well be unable to obtain equivalent information from the German component manufacturer. Such unequal discovery rights would give the German company a distinct and unfair advantage in its efforts to avoid joint and several liability.

Such a lop-sided discovery regime not only would distort individual cases, but would disproportionately encourage the filing of product liability claims against U.S. manufacturers. Under foreign law, as under U.S. law, internal documents that purportedly reflect a company's awareness of risk can be used to establish liability for product defects. See Fowler, *supra*, at 194 (describing English judicial decision concluding that "if the risk is known, or should have been known, then the producer continues to supply and produce at his own risk"). If Section 1782 could be used to obtain such internal

documents from U.S. manufacturers when the foreign tribunal would not afford such discovery against a domestic defendant, then foreign attorneys would have a disproportionate incentive to sue American companies. Having once obtained discovery of an American manufacturer's internal files, the attorneys involved would become "educated" about the evidence and would be able to apply their knowledge of the evidence to the claims of other plaintiffs. Indeed, it is easy to envision the establishment of U.S.-style "document repositories" for use by plaintiffs in foreign group actions. While litigation against American defendants thus would flourish, these attorneys would be less eager to sue non-American companies, from which evidence suggestive of liability would be more difficult to obtain.

Entrepreneurial foreign attorneys already are inventing new ways to employ Section 1782.[3] If this Court affirms the Ninth Circuit's decision and installs a permissive construction of Section 1782 in courts nationwide, this trend undoubtedly will accelerate. If that occurs, then U.S.

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[3] For example, in a case that is now on appeal to the Seventh Circuit, a federal district court in Wisconsin applying Section 1782 has ordered a U.S. company to use its power as indirect shareholder of an Australian company to obtain documents from that company and provide them for use in Australia to a private entity engaged in litigation against the subsidiary in Australia. The applicant approached the court after the Australian court refused to order the Australian company to produce those same documents. *Kestrel Coal Pty. Ltd.* v. *Joy Global Inc.*, No. 03-3604 (7th Cir.). This is precisely the scenario that the First Circuit was seeking to avoid when it decided to require, as a prerequisite to assistance under Section 1782, "a threshold showing that the information would be discoverable in the foreign jurisdiction if located there." *In re Application of Asta Medica, S.A.*, 981 F.2d at 6 (predicting that a foreign litigant denied discovery abroad would attempt to "side-step that result by racing here and obtaining the information under Section 1782").

manufacturers that sell their products abroad will operate under the rule of foreign product liability law, without the benefit of the discovery procedures that foreign courts and legislatures have decided are appropriately used in civil actions under those laws. As we discuss below, Congress plainly did not intend that result.

III. THE NINTH CIRCUIT'S CONSTRUCTION OF SECTION 1782 FLOUTS THE INTENT OF CONGRESS TO PROMOTE EFFICIENT COOPERATION IN INTERNATIONAL LITIGATION

Both the First and the Eleventh Circuits require private applicants seeking information under Section 1782 to demonstrate that "the information sought in the United States would be available under foreign law." *Asta Medica,* 981 F.2d at 2; see *In re Lo Ka Chun*, 858 F.2d 1564, 1566 (11th Cir. 1988); *Request for Assistance From Ministry of Legal Affairs of Trin. & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988). The Ninth Circuit erred in rejecting that sensible rule. Indeed, the Ninth Circuit compounded the problem by granting discovery rights to a private non-litigant not subject to *any* reciprocal discovery in a foreign proceeding.

When Congress amended Section 1782 in 1964, its purpose was to facilitate foreign litigation, and to encourage reciprocal action by other countries, by making the location of information irrelevant to its availability for use in foreign proceedings. Congress clearly did not intend U.S. courts to order the production of documents that would not have been discoverable in the foreign proceeding if they had been located in the foreign jurisdiction. When it enacted the package of legislation that included the relevant amendments to Section 1782, Congress stated that the legislation would "constitute a major step in bringing the United States to the forefront of nations *adjusting their procedures to those of sister nations* and thereby providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in

litigation with international aspects." S. Rep. No. 88-1580 (1964), *reprinted in* 1964 U.S.C.A.A.N. 3782, 3783 ("Senate Report") (emphasis added); see also *id.* (expressing desire to "invite foreign countries similarly to adjust their procedures."). Specifically with respect to Section 1782, the Senate Report stated that the amendments were intended to "clarify[] and liberalize[] existing U.S, procedures for assisting foreign and international tribunals and litigants in obtaining oral and documentary evidence in the United States and *adjust[] those procedures to the requirements of foreign practice*." *Id.* at 3788 (emphasis added).

The text of the provision, which allows the court to order testimony or production of documents "for use in a proceeding in a foreign or international tribunal" (28 U.S.C. § 1782(a)), similarly conveys Congress's intent that U.S. courts attempt to satisfy *the foreign tribunal's* discovery requirements. In contrast, nothing in the language or legislative history of Section 1782 suggests that Congress wanted federal courts to *ignore* the contours of foreign discovery practice when considering an application under Section 1782.

The Ninth Circuit determined that "allowance of liberal discovery" was "consistent with the twin aims of Section 1782: providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." Pet. App. 8a. But there is nothing "efficient" about forcing defendants to produce more information than could have been obtained in the foreign proceeding, simply because the documents in question happen to be located here. To the contrary, from the perspective of the foreign tribunal, that approach results in *excessive* and often one-sided discovery. Moreover, it would be extremely *inefficient* if the liberality of our discovery rules encouraged foreign litigants to come here to obtain informa-

tion *that is also located abroad*, simply because it is easier to convince our courts to order that it be produced.[4]

Nor is the Ninth Circuit's ruling supported by the goal of encouraging reciprocal action by other countries. Congress hoped that foreign countries would provide U.S. litigants seeking information abroad with the same discovery rights (not more, and not less) that they would have if they were seeking information in the United States under U.S. law. That goal would be achieved if foreign courts, like the First and Eleventh Circuits, granted discovery to U.S. litigants who could establish that they would be entitled to the information if it were located here.

The Ninth Circuit also asserted, without elaboration, that "good and sound policy reasons" support its decision. Pet. App. 8a. But considerations of policy weigh heavily *against* affording foreign litigants expansive rights to obtain discovery from U.S. companies when they would not be able to exercise such rights against their compatriots at home. First, "foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws." *Asta Medica*, 981 F.2d at 6. As discussed above, other countries have chosen not to adopt American-style discovery procedures, and many nations are affirmatively hostile to U.S. practices. "Few actions could more significantly impede the development of international cooperation among courts than if the courts of the United States operated to give liti-

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[4] Indeed, as explained in footnote 3, *supra*, a federal district court recently ordered a U.S. company to obtain from its Australian indirect subsidiary documents *located in Australia*, so that the documents could be produced in the U.S. to an *Australian* plaintiff that wanted to use the documents in an *Australian* proceeding. Nothing could be more inefficient than forcing American companies to serve as conduits for foreign documents that must circle the globe so that they can be used in litigation in the foreign jurisdiction where they originated.

gants in foreign cases processes of law to which they were not entitled in the appropriate foreign tribunals." *In re Court of the Comm'r of Patents for the Republic of South Africa*, 88 F.R.D. 75, 77 (E.D. Pa. 1980).

Second, as discussed above, "foreign tribunals and legislatures * * * have carefully chosen the procedures and laws best suited for their concepts of litigation." *Asta Medica*, 981 F.2d at 6. The use of Section 1782 to produce documents not available under local discovery rules would distort the foreign proceedings. Furthermore, allowing expansive discovery in the U.S. may make the foreign proceedings more expensive, protracted, and burdensome than is necessary to resolve the case appropriately under foreign law.

Finally, as discussed above in Section II, allowing non-mutual discovery would prejudice U.S. companies engaged in foreign litigation and create special incentives to sue them in the first place. In pursuing its goal of international cooperation in litigation, Congress surely did not intend to put a finger on the scale to weigh *against* U.S. citizens litigating abroad. See *Asta Medica*, 981 F.2d at 5-6 (Congress did not mean "to place United States litigants in a more detrimental position than their opponents when litigating abroad"). Nor did Congress intend to create the competitive disadvantages to U.S. companies that would result if Section 1782 made them *more* vulnerable to foreign litigation than their foreign counterparts.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States, the world's largest business federation, is a nonprofit corporation organized under the laws of the District of Columbia. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber is well situated to address the merits of this case on behalf of companies collectively responsible for a substantial portion of total U.S. economic activity.

The Chamber is particularly concerned about the growing trend of private actors – including litigants, class-action counsel, and complainants before foreign administrative authorities – to engage in global forum shopping by attempting to export U.S. laws and procedures worldwide. More troubling is that these actors recently have been successful in making U.S. courts complicit in this process, despite foreign countries' protests. In one case in which this Court recently granted certiorari, foreign litigants and their counsel sued in U.S. courts, alleging antitrust

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, the Chamber states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

injuries sustained *outside* of U.S. commerce. *F. Hoffman-LaRoche, Ltd.* v. *Empagran S.A.*, No. 03-724, cert. granted Dec. 15, 2003. In *Empagran*, the D.C. Circuit held plaintiffs entitled to U.S. laws and procedures, regardless whether U.S. laws and procedures were different from, or even inimical to, those of the jurisdiction where any harm may have occurred. In this case, respondent has convinced the Ninth Circuit that it might be entitled to discovery of documents and testimony from petitioner, based on the existence of a mere preliminary investigation by the European Commission. Respondent claims such a statutory right whether or not (1) it is a litigant before a foreign tribunal; (2) there is any adjudicative proceeding before a foreign tribunal under way at all; and (3) the laws and procedures of the foreign jurisdiction allow the discovery respondent seeks.

The Chamber believes that the decision below impermissibly broadens the scope of discovery allowed to private parties seeking information from their business rivals under 28 U.S.C. § 1782. The unreasonably permissive rules applied below operate any time that the company from which discovery is sought is subject to the jurisdiction of any foreign sovereign's courts or regulatory bodies. Burdensome discovery requests are not unique to these broad interpretations of Section 1782, but the Ninth Circuit's decision magnifies the burden. Under that decision, parties can obtain discovery without themselves bearing any of the expenses of litigation and without being required to surmount even the low hurdles of Federal Rules of Civil Procedure 8 and 11. Important disincentives to harassing and unwarranted discovery requests are eliminated. If the Ninth Circuit's ruling stands, a business can obtain broad discovery by merely filing a complaint with a foreign enforcement agency.

The Ninth Circuit's ruling allows competitors to seek this discovery even if the relevant foreign nation does not allow it. That circumvention of foreign discovery rules can place companies like members of the Chamber, which have a presence in the United States, at a substantial disadvantage vis-à-vis their

foreign rivals. Rivals can inquire into competitively sensitive information, under the imprimatur of a U.S. District Court, even though the information is not needed by the foreign sovereign's court or administrative body.

The Ninth Circuit attributed to Congress an intent to impose substantial burdens on U.S. businesses conducting business in foreign countries. Members of the Chamber, many of which conduct business abroad and are therefore subject to the jurisdiction of foreign sovereigns' courts and administrative bodies, have a substantial interest in the restoration of appropriate limits on discovery under Section 1782.

STATEMENT

A. The Statutory Scheme

Section 1782 of Title 28 of the U.S. Code was enacted to permit district courts to assist litigants in foreign adversary proceedings to obtain discovery in the United States. Congress enacted the modern Section 1782 in 1948 and amended the section in significant part in 1964.[2] The 1964 amendments were part of a larger piece of legislation with the express purpose of "providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects." S. REP. NO. 88-1580, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3783. The goal of the changes was to "bring[] the United States to the forefront of nations adjusting their procedures to those of sister nations * * * [and] invite foreign countries similarly to adjust their procedures." *Ibid.*

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[2] Section 1782 actually is descended from a statute originally enacted in 1855. See *In re Letter Rogatory from the Justice Court*, 523 F.2d 562, 566-569 (6th Cir. 1975) (appendix detailing the history of judicial assistance statutes). The statute was enacted in 1948 at its current place in the U.S. Code. Act of June 25, 1948, ch. 646, 62 Stat. 949. In 1949, Congress amended Section 1782 in pertinent part to replace the phrase "civil action" with "judicial proceeding." Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103.

This legislation was forwarded to Congress in 1963 by the Commission and Advisory Committee on International Rules of Judicial Procedure. With the proposed legislation, the Commission included a May 27, 1963, letter by President John F. Kennedy, expressing the administration's view that the proposed legislation "would be most desirable from the standpoint of the administration of international justice on behalf of private litigants." *Id.* at 3794. Walter Olney III, the Director of the Administrative Office of the U.S. Courts, wrote to the Chairman of the Senate Judiciary Committee in 1964, noting the approval of the Judicial Conference of the United States. Director Olney stated: "The procedures that would be presented by this legislation * * * would alleviate some of the many procedural problems private litigants now face in prosecuting litigation with international aspects." *Ibid.*

The scheme adopted in 1964 to assist private litigants included new statutory sections as well as amendments to pre-existing sections, all of which have the same express purpose of assisting with "litigation with international aspects." *Id.* at 3785. For example, Congress added 28 U.S.C. § 1696, which provides for service of process in the United States in "litigation with international aspects" (*id.* at 3784) pursuant to a letter rogatory or request "by a foreign or international tribunal," or "upon application of any interested person." 28 U.S.C. § 1696(a). Congress also amended 28 U.S.C. § 1781 (which had been enacted in 1948 together with Section 1782), giving the Department of State express authority to respond to letters rogatory or requests "by foreign and international tribunals." 1964 U.S.C.C.A.N. at 3787.

In the same legislation Congress amended Section 1782, to "clarif[y] and liberalize[] existing U.S. procedures for assisting foreign and international tribunals and litigants" and "adjust[] those procedures [for obtaining evidence in the United States] to the requirements of foreign practice and procedure." *Id.* at 3788. The Senate Report noted specifically the increasing use of "investigating magistrates" and "the constant growth of ad-

ministrative and quasi-judicial proceedings all over the world" as reasons for replacing the prior term "judicial proceeding" with "proceeding in a foreign or international tribunal." *Ibid.* This change was made in part to ensure judicial assistance for French *juges d'instruction*, which are factfinders roughly equivalent to the grand jury in U.S. criminal practice. *In re Letters Rogatory Issued by Dir. of Inspection of the Gov't of India*, 385 F.2d 1017, 1020 (2d Cir. 1967) (Friendly, J.). The Senate Report also described a purpose of the amendments as clarifying *who* (in addition to the foreign or international tribunal) was entitled to seek discovery under Section 1782: "an interested person, such as a person designated by or under a foreign law, or a party to the foreign or international litigation." 1964 U.S.C.C.A.N. at 3789.

In 1996, Congress added a single phrase to indicate that "a proceeding in a foreign or international tribunal" includes "criminal investigations conducted before formal accusation." Pub. L. No. 104-106, Div. A, Title XIII, § 1342(b), 110 Stat. 496. In its current form (as amended in 1949, 1964, and 1996), Section 1782 reads in pertinent part (emphasis added):

> (a) The [U.S.] district court * * * may order [a person] to give his testimony or statement or to produce a document or other thing *for use in* a *proceeding* in a *foreign or international tribunal*, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal *or upon the application of any interested person* * * *. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

Companies and individuals have sought the assistance of U.S. courts in obtaining discovery on the theory that they are "interested persons" even when they are not litigants or otherwise authorized by foreign law to seek discovery; even when there is no "proceeding in a foreign or international tribunal" taking place; and even when foreign law does not permit the discovery of the documents or testimony sought. Splits of authority have developed over what constitutes a "proceeding in a foreign or international tribunal" and over whether the documents or testimony sought must be discoverable under the law of the sovereign country where the proceeding is taking place. This Court granted certiorari to resolve those splits and other questions raised by petitioner and the Acting Solicitor General.

B. The Proceedings Below and the Ninth Circuit's Decision

Respondent Advanced Micro Devices, Inc., is one of petitioner Intel Corporation's primary competitors in the production and sale of computer microchips. Respondent filed a complaint with the European Commission Directorate General-Competition (Directorate), one of more than 100 such complaints the Commission receives yearly. European Commission Directorate-General for Competition, *XXXIst Report on Competition Policy* 11, 53 fig. 1 (2001), available at http://europ.eu.int/comm/competition/annual_reports/2001/competition_policy/eu.pdf. In much the same manner, myriad complaints are filed yearly in the United States with the Antitrust Division of the U.S. Department of Justice and with the Federal Trade Commission.

To file a complaint with the European Commission, a party like respondent need only send a letter or a facsimile, with "the complainant's name and address," the "identity of the firms in question," "[e]vidence of the complainant's legitimate interest in the matter," and a "clear description of the subject of the complaint and the reasons for thinking that the practice infringes [European] Community competition law." *Complaints from the*

Public on Competition Matters, published at http://europa.eu.int/comm/competition/citizen/citizen_complaints_en.html (visited Dec. 13, 2003). A similar complaint procedure exists in both U.S. antitrust enforcement agencies. See *How to Report a Possible Violation*, published at http://www.usdoj.gov/atr/contact/newcase.htm (visited Dec. 13, 2003); *Antitrust Contact Information*, published at http://www.ftc.gov/ftc/bccontact.htm (visited Dec. 13, 2003).

By filing the complaint, respondent initiated an investigation, in which the Directorate "may gather information on its own and provide the complainant with an opportunity to support its allegations." Pet. App. 3a. "The Directorate also has the authority to seek information directly from the alleged infringer [of Community competition law] and may punish a failure to provide information." *Ibid.* (citing Council Regulation 17/64, arts. 11, 14). The process – which is *not* an adversary proceeding (*ibid.*) – is extremely similar in all pertinent respects to the investigatory process following a complaint made to the U.S. antitrust enforcement agencies. During an investigation by the Antitrust Division or Federal Trade Commission, anybody may comment simply by sending an e-mail to the agency. See http://www.usdoj.gov/atr/contact.html#cases; http://www.ftc.gov/ftc/bccontact.htm. Complainants regularly present allegations of anticompetitive conduct to the U.S. agencies. Both agencies possess authority under the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314 (CID Statute), to issue "civil investigative demands" seeking documents or testimony, and compliance is compelled by the criminal code, 18 U.S.C. § 1505.

The investigation by the Directorate is a preliminary investigation, which, as the Ninth Circuit itself recognized, "is not considered an adversarial proceeding." Pet. App. 3a (citing *AKZO Chemie BV* v. *Commission*, 1 C.M.L.R. 231, 248 (E.C.J. 1986)). At this point, the Directorate still could simply decide not to pursue the complaint, an exercise of prosecutorial discretion potentially subject to limited review by the European Court of First Instance. Pet. App. 4a (citing *Stork Amsterdam*

BV v. *Commission*, 5 C.M.L.R. 31, 42 (Ct. of First Instance 2000)); U.S. Br. 19 & n.7 (Oct. 6, 2003) (explaining limited nature of judicial review of Commission decision not to proceed). If, after concluding the preliminary investigation, the Commission were to decide to proceed by issuing a formal statement of objections against petitioner, petitioner – and not respondent – would have the right to a hearing before an independent hearing officer. The hearing officer would issue a report on the hearing, and thereafter the Commission's staff would make a recommendation. Then, based on that recommendation, the Commission would either dismiss the complaint or issue a decision drafted by the investigative staff finding a violation. In this case, the matter has not progressed beyond the preliminary investigation by the Directorate. But, despite the absence of an adversary proceeding between the Commission and petitioner, respondent – which would not be a litigant even at a *future* stage – seeks discovery under Section 1782.

The Ninth Circuit interpreted Section 1782 to give mere complainants before the Commission a right to discovery. The court held that the Commission's preliminary investigation sufficed to allow Section 1782 discovery because "the investigation being conducted by its [the Commission's] Directorate is related to a quasi-judicial or judicial proceeding" and, "[a]lthough preliminary, the process qualifies as a 'proceeding before a tribunal' within the meaning of" Section 1782. Pet. App. 7a. The court also was unconcerned that the law of the European Union does not enable complainants to access the materials respondent sought from petitioner, holding instead that Section 1782's failure expressly to *exclude* materials not discoverable under the law of the foreign tribunal means that those materials *are* discoverable. Pet. App. 8a. The Ninth Circuit justified its "allowance of liberal discovery" by citing the "twin aims of Section 1782: providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." *Ibid.* (citing *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992)). The Ninth Circuit therefore

ordered the district court to "consider" respondent's discovery request "on the merits." *Id.* at 9a.

SUMMARY OF ARGUMENT

The text of Section 1782 limits the parties that may seek judicial assistance from a U.S. district court under the section to the tribunal itself and to "interested persons." In this case the Directorate expressly declined to request the documents respondent seeks under Section 1782, and the Court of First Instance certainly has not sought them – so only an "interested person" may avail itself of the statute. Although the Ninth Circuit failed to consider the question, respondent cannot be an "interested person." The only reasonable reading of the statute limits persons entitled to discovery to litigants and those (principally governmental officials) otherwise denominated by foreign law as having the kind of "interest" that gives them discovery rights under foreign law – and, unsurprisingly, all indications are that the reasonable construction is just what Congress intended. 1964 U.S.C.C.A.N. at 3789. Respondent is not a litigant, and may never be a litigant; and there is no provision of European Union law that grants respondent the right to discovery.

Section 1782, by its text, permits judicial assistance to parties seeking discovery only when the request is for use in a "proceeding in a foreign or international tribunal." A tribunal, in turn, is an adjudicative agency. Respondent sought discovery under Section 1782 while the Directorate was conducting a *preliminary investigation* – the result of which at most could be a decision by the Commission to issue, or not to issue, a formal statement of objections. Finally, the Commission's ultimate decision regarding a formal statement of objections was reviewable by a tribunal – the European Court of First Instance. No basis exists for interpreting the phrase "for use in a proceeding in a * * * tribunal" to encompass discovery at all stages of investigation that may, or may not, end up before an adjudicative body.

The Ninth Circuit also erred by holding that Section 1782 authorizes discovery in the United States even if the materials sought would not be discoverable in the foreign tribunal. Despite the Ninth Circuit's statements to the contrary, this holding impedes, rather than advances, Congress's important – and clearly expressed – concerns for international comity. But the court's error extends further, because respondent would not even be entitled to discovery under U.S. law. The Ninth Circuit erred by attributing to Congress an intent to enact a discovery scheme that has no precedent either in domestic or in foreign law and allows easy circumvention of limitations on discovery that foreign sovereigns consider important.

ARGUMENT

The Ninth Circuit has adopted a reading of Section 1782 that eliminates any symmetry of obligations between the United States and foreign sovereigns; that does violence to the language, structure, history, and purposes of the statute; and that produces far-reaching results that Congress could not have intended. Because the discovery that respondent seeks from petitioner is not available under Section 1782, the Court should reverse the decision of the Ninth Circuit. The Ninth Circuit was wrong on each of the three issues raised by the petition; rejecting its position on any one of those issues would dispose of this case.

The Ninth Circuit's interpretation of Section 1782 does violence to the text, structure, and purposes of the statute in three significant respects. First, by failing to limit discovery to litigants before the foreign proceedings and a carefully circumscribed class of other "interested persons," the Ninth Circuit's interpretation of the statute expands discovery in foreign proceedings *ad infinitum*, allowing discovery by any person who can claim an "interest" in some potential future proceeding in the broadest possible sense of that term. Second, by treating an investigation by the Directorate as sufficient because it is, relates to, or leads to a "proceeding in a foreign * * * tribunal," the Ninth Circuit upended the statutory mandate that discovery

be permitted only after an adversary proceeding has been initiated. Third, by allowing discovery that is not permitted under EU law, the Ninth Circuit undermined the important international comity rationale underlying Section 1782.

I. Judicial Assistance Under Section 1782 Is Available to Litigants, to Persons Otherwise Denominated "Interested Persons" Under Applicable Foreign Law, and to the Foreign or International Tribunal – But Not to Respondent

Section 1782 should be construed to limit "interested person[s]" who may achieve discovery under the section to *litigants* before a foreign tribunal – or persons (generally, governmental officials) that foreign law otherwise permits to obtain discovery. The Eleventh Circuit has interpreted the phrase "interested persons" to include private *litigants* and "foreign official[s] properly designated under foreign law." *In re Request for Judicial Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1155 (2d Cir. 1988). This interpretation imposes a sensible and necessary limit on the discovery available to private parties under Section 1782. The Ninth Circuit reached the wrong decision largely because it utterly failed to consider the question whether respondent was a statutory "interested person."

Failing to read such a sensible limitation into the phrase "interested person[s]" has the perverse result of removing all limits on the set of persons who are authorized by the section to seek discovery of petitioner's, and others', confidential business information. This Court looks to statutory structure, purpose, and history to read limitations into statutory language that otherwise is unbounded. See *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 147 (2001) (limiting the scope of the logically unbounded statutory phrase "relating to" in ERISA preemption). The Court should do so here.

Congress used precisely the same wording that is found in Section 1782 – "upon application of any interested person" –

elsewhere in the 1964 legislation. "'[I]dentical words used in different parts of the same act are intended to have the same meaning.'" *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) (quoting *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986)). In 28 U.S.C. § 1696(a), Congress authorized district courts to offer judicial assistance for service of process in response to a request "by a foreign or international tribunal or upon application of any interested person." The purpose of Section 1696 is to "provide for service of documents in litigation with international aspects." 1964 U.S.C.C.A.N. at 3785. If respondent, a non-party, is entitled to judicial assistance under Section 1782, non-parties likewise are entitled to judicial assistance making service of process under Section 1696. But that result makes no sense.

Rather, the phrase "any interested person" should be read so that both uses are defensible. Restricting "any interested person" to parties that might have reason to want to effect service – *e.g.*, litigants – produces just such defensible results. And the reference in the legislative history to a "person designated by foreign law" (1964 U.S.C.C.A.N. at 3789; see *Trinidad & Tobago*, 848 F.2d at 1155 ("a foreign official properly designated under foreign law may fall within the definition of 'interested person'")) might readily denote an official designated to assist in service and discovery matters in foreign litigation. Compare 28 U.S.C. § 1608(a)(4) (U.S. Secretary of State designated by U.S. law to assist in service of process on foreign sovereigns).

All indications are that when enacting Section 1782 Congress intended to limit "any interested person" to private litigants, or to foreign officials properly designated by foreign law as having the kinds of responsibilities that entitle them to discovery as non-litigants. According to the legislative history of Section 1782, an "interested person" is a "person designated by foreign law, or a party to the foreign or international litigation." 1964 U.S.C.C.A.N. at 3789. See *Trinidad & Tobago*, 848 F.2d at 1154-1155 (quoting the legislative history);

see also *In re Lancaster Factoring Co.*, 90 F.3d 38, 42 (2d Cir. 1996) ("The legislative history to § 1782 makes plain that 'interested person' includes 'a party to the foreign * * * litigation.'") (quoting 1964 U.S.C.C.A.N. at 3789). President Kennedy and Director Olney (of the Administrative Office of the U.S. Courts) spoke only of "private litigants," and the legislative history otherwise discussed "litigation with international aspects." See p. 4, *supra*. Notably absent from the legislative history is *any* discussion of parties, like respondent, that are not litigants and have no right under foreign law to conduct discovery in the proceeding for which the U.S. discovery supposedly is sought.

The Acting Solicitor General seems to think discovery *should* be denied in this case (see U.S. Br. 18 (Oct. 6, 2003)), yet he urges that the matter is completely discretionary with district judges around the country and that this Court should hold that mere complainants in European Commission proceedings are "interested persons" (*id.* at 16, 18). His sole reasoning in support of that argument, however, is the *ipse dixit* that "the words 'interested person' are broad" coupled with the correct observation that Congress's selection of that phrase – as opposed to "litigant" – was "intentional." *Id.* at 16. But no one contends that "interested persons" are *only* litigants – rather, the dispute is whether the class of "interested persons" who are *not* litigants is a very narrow class consistent with the legislative history, the purposes of the statute, and the use of that phrase in other provisions of the 1964 legislation; or is instead expansive so that any old "interest" in the non-legal sense of that word will suffice. Surely even the Acting Solicitor General would recognize *some* limits on the "interest[s]" that will trigger Section 1782; a scholar's or corporate gadfly's or journalist's literal "interest" in the European proceedings could not possibly entitle that person to invoke Section 1782. But the Acting Solicitor General offers no limiting principle that would draw the line beyond litigants but short of the entire universe of persons willing to say, "I'm interested." Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 567-568 n.3 (1992) ("It is unclear to us what

constitutes a 'genuine' interest; how it differs from a 'non-genuine' interest (which nonetheless prompted a plaintiff to file suit); and why such an interest in animals should be different from such an interest in anything else that is the subject of a lawsuit."). Petitioner and the Chamber, by contrast, offer defensible lines well grounded in both statutory structure and legislative history.

Interpreting the statute to limit the persons entitled to take advantage of Section 1782 makes perfect sense in light of the limitations on discovery available under U.S. law. Under the Federal Rules of Civil Procedure, discovery is available only if a party first files a complaint adequate to survive a motion to dismiss. See Fed. R. Civ. P. 3, 12(b)(6). A defendant's ability to seek dismissal under Rule 12(b)(6) – and the ability to seek sanctions under Rule 11 – ensure that the discovery process is not employed frivolously. Also, the tort of abuse of process is available to U.S. defendants who can plead and prove that their adversary sought to gain from the process, but not from the end, of the litigation. See, *e.g.*, *Warren* v. *Wasserman, Comden & Casselman*, 271 Cal. Rptr. 579, 581 (Cal. App. 1990) (describing abuse of process under California law). And the federal rules permit strict limitations on access to discovery by non-parties, in the form of protective orders under Rule 26(c).[3]

Finally, the statutory purposes fully support limiting use of Section 1782 to litigants and a narrow class of other "interested

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[3] Stringent protections also exist for companies being investigated by U.S. administrative agencies – including the Antitrust Division and Federal Trade Commission. The CID statute provides: "[N]o documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material." 15 U.S.C. § 1313(c)(3). And the Freedom of Information Act contains express exemptions for "trade secrets and commercial or financial information obtained from a person and privileged or confidential" and certain "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(4), (b)(7).

persons" with legally cognizable interests defined by foreign law. As the Ninth Circuit itself described "the twin aims of Section 1782," they were "providing efficient assistance to *participants in international litigation* and encouraging foreign countries by example to provide *similar* assistance to our *courts*." Pet. App. 8a (emphasis added) (citing *Malev*, 964 F.2d at 100). The obvious conclusion to draw from the fact that these are the statutory purposes is that only litigants and a small class of other interested persons closely linked to court proceedings are the intended beneficiaries of the statute, yet the Ninth Circuit without analysis announced the polar opposite conclusion that these purposes support "allowance of liberal discovery," Pet. App. 8a, apparently meaning that all statutory terms are to be construed as expansively as possible. This mode of statutory interpretation will not do.[4] Rather, as this Court's statutory interpretation jurisprudence dictates, "interested persons" must be construed no more expansively than the text, structure, purposes, and history of Section 1782 will support. As shown above, all of those indicia of legislative intent support a narrow construction that does not include mere complainants in European Commission investigations.

II. Section 1782 Permits Judicial Assistance in Connection With A Proceeding in a Foreign or International Tribunal – And Not as Part of a Mere Investigation by Law-Enforcement Authorities

"The principal requirement imposed by § 1782 is that the requested discovery be for use in 'a proceeding.'" *In re Lancaster Factoring*, 90 F.3d at 41. This Court may reverse the

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[4] "'[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'" *PBGC* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam)).

decision below because the investigation by the Directorate was not a proceeding before a tribunal, and not every proceeding "related to" such a proceeding (Pet. App. 7a) can trigger the statute. A "tribunal" is a proceeding "in which an adjudicating function is being exercised." *Lancaster Factoring*, 90 F.3d at 41 (holding that a then-pending foreign bankruptcy proceeding met the statutory requirement). "[N]ot every conceivable fact-finding or adjudicative body is covered, even when the body operates under the imprimatur of a foreign government." *Republic of Kazakhstan* v. *Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999). The range of applications for Section 1782 is limited; as Judge Friendly observed, the section does not "go to the full extent of authorizing a district court to execute letters rogatory whenever requested by a foreign country or party there." *Gov't of India*, 385 F.2d at 1020.

The Ninth Circuit held that the preliminary investigation by the Directorate was sufficient to trigger Section 1782, offering a justification based on two faulty conclusions. *First*, by rejecting petitioner's argument that the Commission "is not a tribunal" (Pet. App. 6a), the Ninth Circuit seems to have concluded that at some point the Commission will become a "tribunal," presumably because the court saw the final decision by the Commission after a second-phase investigation as a quasi-judicial proceeding. *Second*, the Ninth Circuit concluded that it was adequate that the preliminary investigation in which respondent sought the discovery was "related to a quasi-judicial or judicial proceeding." Pet. App. 7a. Both conclusions are wrong.

A. The proceedings leading to an ultimate Commission decision are not quasi-judicial. In urging this Court to grant certiorari in this case, the European Commission stated that "[t]he Ninth Circuit's holding fundamentally misconstrues the nature of the European Commission. The Commission functions primarily as a law enforcement agency in the antitrust field * * *. The Commission * * * never adjudicates disputes between parties." Brief of the Commission of the European Com-

munities as *Amicus Curiae* in Support of Petitioner 4-5 (Nov. 15, 2002). The district court reached the same conclusion, citing the European Commission's *Eleventh Report on Competition Policy* (1981): "The Commission['s] * * * 'procedure[] relating to restrictive practices and abuse of dominant position [the substance of the complaint underlying the Commission's investigation of petitioner] is administrative and not judicial; it must not be turned into a trial.'" Pet. App. 14a.

This Court should defer to the Commission's understanding of its own procedures both as a matter of comity *and* because the Commission is far better placed than any other source to interpret its role. Compare *Kolovrat* v. *Oregon*, 366 U.S. 187, 194-195 (1961) (according weight to interpretations by the government of the Kingdom of Serbia and the U.S. State Department of a treaty between the countries); *S&S Machinery Co.* v. *Masinexportimport*, 706 F.2d 411, 415 (2d Cir.) ("[S]tatements of foreign officials – regardless of their political or ideological orientation – have been accorded great weight in determining whether an entity is entitled to claim the protection of the FSIA."), cert. denied, 464 U.S. 850 (1983). Such deference is accorded to U.S. agencies' interpretations of their own proceedings. See *International Tel. & Tel. Corp.* v. *International Bhd. of Elec. Workers*, 419 U.S. 428, 441 (1975) ("While an agency's interpretation of the [Administrative Procedure] Act may not be entitled to the same weight as the agency's interpretation of its own substantive mandate, its characterization of its own proceeding is entitled to weight, and that characterization may in turn have relevance in determining the applicability of the Act.") (citation omitted).

This Court can reverse the Ninth Circuit's misinterpretation of the "proceeding in a foreign * * * tribunal" requirement on the basis of the Commission's interpretation of its own law and procedures. But an analysis of the investigation based on which respondent sought discovery also leads to the conclusion that neither the Directorate's preliminary investigation nor even

its final decision is a "proceeding in a * * * tribunal" within the meaning of 28 U.S.C. § 1782(a).

The preliminary investigation by the Directorate is functionally indistinguishable from a preliminary investigation by the Antitrust Division or the Federal Trade Commission. According to European Council Regulation 17/62, art. 14(1):

> In carrying out the duties assigned to it * * *, the Commission may undertake all necessary investigations * * *. To this end the officials authorized by the Commission are empowered:
>
> (a) to examine the books and other business records;
>
> (b) to take copies of or extracts from the books and business records;
>
> (c) to ask for oral explanations on the spot;
>
> (d) to enter the premises; land and means of transport of undertakings.

Also, the Directorate "may obtain all necessary information from * * * undertakings and associations of undertakings. * * * The owners of the undertakings or their representatives * * * shall supply the information requested." Council Regulation 17/62, art. 11(1), (4).

The Directorate's investigative powers compare closely with the powers exercised by the Antitrust Division under the CID Statute (15 U.S.C. § 1312(a)):

> Whenever the * * * Antitrust Division * * * has reason to believe that any person * * * may have any information, relevant to a civil antitrust investigation * * *, [it] may * * * issue in writing * * * a civil investigative demand requiring such person to produce such documentary material for inspection and copying * * *, to answer in writing written interrogatories, to give oral testimony * * *, or to furnish any combination of such material, answers, or testimony.

Other comparable powers under U.S. law include grand jury investigations (Fed. R. Crim. P. 6) and search warrants executed by the FBI (Fed. R. Crim. P. 41).

Once the investigation moves to a second phase – which the investigation that is the subject of this case has not done – it is true that the Commission may determine that the party under investigation has violated the law and may take corrective measures. But that fact alone does not make the Commission a "tribunal." Rather, because the Commission proceeds in the second phase *without* an adversary process – a private complainant such as respondent Advanced Micro Devices has no right to do anything more than observe the non-evidentiary hearing the Commission conducts before making its decision – any conclusion by the Ninth Circuit that the Commission is a "tribunal" is incorrect, even if the investigation reaches the second phase.[5]

Also, again, the interpretation of the key phrase "proceeding in a foreign or international tribunal" in Section 1782 must be harmonized with the interpretation of the identical phrase in Section 1696. *ACF Indus.*, 510 U.S. at 342. Because Section 1696 allows assistance for service-of-process purposes, a "proceeding in a foreign * * * tribunal" in that section can only be a proceeding in which service of process might occur – *i.e.*, *not* a mere administrative investigation. It is anomalous to interpret "proceeding in a foreign * * * tribunal" in Section 1782 (as the Ninth Circuit did) to encompass an administrative investigation in which judicial assistance effecting service under Section 1696 would be unnecessary.

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[5] See *Fonseca* v. *Blumenthal*, 620 F.2d 322, 324 (2d Cir. 1980) ("Unlike the [French] juges d'instruction, the Superintendent * * * is charged to act in the government's interest to enforce the law * * *. He has extraordinary powers to order and conduct far-reaching investigations. Upon completion of his investigation, he is empowered to determine whether violation of the law has occurred. Although the subject of the investigation may be represented by counsel, the government's sole representative is the Superintendent itself.").

The call for harmonization is accentuated in this case because Congress *enacted* Section 1696 as part of the same legislation in which it *amended* Section 1782. Had Congress meant for the change from "judicial proceeding" to "proceeding in a foreign * * * tribunal" to render Section 1782 applicable to administrative investigations or prosecutions, it would have preserved the prior statutory term "judicial proceeding" (or some comparable phrasing) in Section 1696. But the new phrase gives effect to *both* sections if "proceeding[s] in a foreign tribunal" encompasses the range of adjudicative functions in which service of process may be needed, but not other types of legal procedures. Under that manifestly reasonable interpretation, a "proceeding" in a "tribunal" does not include either the preliminary investigation at issue in this case, or any subsequent (and currently speculative) second-phase investigation.

B. The Ninth Circuit's analysis is unclear whether it is the Commission decision to issue, or not to issue, a formal complaint that supposedly constitutes the "proceeding in a tribunal," or whether it is the possible later review by the Court of First Instance. But, in either case, the Ninth Circuit further erred by creating a "related to" test (Pet. App. 7a) for deciding whether the investigation by the Directorate might qualify as a proceeding under Section 1782.

The Ninth Circuit's exception to the clear statutory limitations on the scope of permissible discovery cannot be justified. To begin with, this Court has recognized the breadth of the concept "relatedness." In an Airline Deregulation Act preemption decision, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992), the Court held that the phrase "relating to" in former 49 U.S.C. § 1305(a)(1) (now 49 U.S.C. § 41713(b)(1)) was intended to preempt any state law with "'a connection with, or reference to'" the subject of the preemption clause. (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). And relatedness tests also permit courts to aggregate overall effects of activities that individually may have only *de minimis* effect. See *United States* v. *Lopez*, 514 U.S. 549, 558 (1995).

In creating a "related to" test, the Ninth Circuit apparently believed that Section 1782 could be employed in any situation with *any connection with* a proceeding in a tribunal, even if *de minimis* in nature – a concept that readily might reach activities such as extra-judicial settlement negotiations or mediation. No basis exists to extend the plain language of Section 1782 this broadly without any indication in the text of the statute or elsewhere that Congress had that intent.

And the Ninth Circuit's attempted justification in no way explains its unwarranted extension of the plain language of Section 1782. The court made much of the elimination of the word "pending" from the text of Section 1782, as if that change undermined even the clear interpretation of the language that remains. Pet. App. 6a; accord U.S. Br. 16-17 & n.5 (Oct. 6, 2003). But that minor – and perhaps inadvertent – change in the text of Section 1782 (see *In re International Judicial Assistance for the Federative Republic of Brazil Gen. Univ. Trading Corp.*, 936 F.2d 702, 705 (2d Cir. 1991)) cannot bear the weight that the Ninth Circuit and the Acting Solicitor General have placed on it. Nothing in the legislative history indicates that Congress ever intended that the existence of any and all possible future "proceedings in a foreign * * * tribunal" would justify discovery of U.S. companies' documents and testimony. "If the omission of 'pending' was intended to mean 'eventually occurring,' we would expect to see at least some hint of that thought in the authoritative reports issued by the members of the Senate and House committees." *Id.* at 706.[6]

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[6] The Chamber also agrees with the observation at page 9 of the Commission's own *amicus* brief filed December 23, 2003, concerning possible future review of a non-prosecution decision by the Court of First Instance: "[I]f that feature were sufficient for a Section 1782 petitioner to claim that discovery is 'for use in a foreign ... tribunal,' it would open the statute to discovery requests in connection with *every* administrative agency action, regulation, investigation, license or permit anywhere in the world, so long as the action is ultimately subject to judicial review. Congress cannot have intended such an extreme result."

The Ninth Circuit's view of the elimination of the word "pending" removes *any* temporal limitation on the discovery allowed under the statute.[7] If it is not true after the amendment that a proceeding must either be pending or be of the precise type (pre-indictment criminal investigation) now specifically identified in the statute, then a much more reasonable interpretation of the section has been adopted by the Second Circuit. That court has held that a proceeding justifying discovery under Section 1782 must be "imminent – very likely to occur and very soon to occur in order to satisfy the statutory requirements." *In re Euromepa*, 154 F.3d 24, 29 (2d Cir. 1998) (internal quotation omitted). In *In re Ishihara Chemical Co.*, 251 F.3d 120 (2d Cir. 2001), although the original proceeding in which the discovery was sought had concluded, the party seeking discovery argued that the information would "be used in a new [patent] invalidity proceeding to be instituted in Japan." *Id.* at 126. The Second Circuit rejected that argument. The request for discovery was based on "speculation not only as to the commencement of such a proceeding, but also as to its need for discovery in such a proceeding." *Id.* at 127 n.4. So too here. Under the Ninth Circuit's interpretation of the statute, not only could respondent seek discovery without being a litigant now or in the near future, but also respondent would never have to demonstrate that it *ever will be* a litigant.[8]

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[7] Unwilling to carry his analysis to its logical conclusion, the Acting Solicitor General rejects an "imminence" requirement but insists that there is some limit here because the Commission investigation at issue is "*integrally linked* to a later 'proceeding in a foreign or international tribunal.'" U.S. Br. 17 (Oct. 6, 2003) (emphasis added). But, of course, the "integrally linked" formulation has no more textual basis than an "imminence" requirement, *and* suffers from indeterminacy: it is just as easy to argue that a Commission investigation is *not* integrally linked to a speculative future adjudication as to argue that it is linked to a future adjudicative proceeding.

[8] Even the Eleventh Circuit in *Trinidad & Tobago* – while holding that the proceeding in a foreign tribunal need not necessarily be pending –

In 1996, Congress added to the section the phrase "including *criminal investigations* conducted *before* formal accusation." Pub. L. No. 104-106, Div. A, Title XIII (emphasis added). Congress expanded the judicial assistance permissible in criminal cases under Section 1782 *beyond* the scope that was contemplated previously by the section. Congress's intent was very clear. The amended Section 1782 now permits discovery during the foreign equivalent of the grand jury process – a statutory change that further harmonizes Section 1782 with U.S. procedures. In the U.S. system, substantial pre-indictment investigation occurs – but discovery in the civil system is not allowed until *after* the complaint is filed. The need to amend Section 1782 specifically to allow pre-indictment judicial assistance demonstrates that pre-complaint judicial assistance generally is *not* contemplated by the Section.

Finally, this Court should read Section 1782 to be consistent with related provisions in the U.S. Code. *United Sav. Ass'n of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme * * * because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."). Another statutory section, 15 U.S.C. § 6203(a), permits, "[o]n the application of the Attorney General," pre-complaint discovery in the U.S. as a part of foreign antitrust investigations. Notably, Section 6203 does *not* permit foreign antitrust investigative authorities to seek discovery under Section 1782. Under the Ninth Circuit's rule, respondent may use Section 1782 to conduct discovery before the initiation of a "proceeding," but a foreign antitrust authority must apply for

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limited its holding to requests from "official[s] properly designated under foreign law." 848 F.2d at 1155. "Therefore, the word 'litigant' in the legislative history does not restrict a request for assistance from a *foreign official* to 'pending' proceedings" (emphasis added) – but "a private individual may need to be a litigant in order to be an 'interested person.'" *Ibid.*

such authority through the Attorney General. There is no basis in law or policy for this supposed distinction.[9]

A similar analysis led the Fifth Circuit to hold that foreign private commercial arbitration was not a "proceeding in a * * * tribunal" for purposes of Section 1782. See *Republic of Kazakhstan*, 168 F.3d at 882-883. In *Republic of Kazakhstan*, the court compared to Section 1782 the judicial assistance available in domestic private commercial arbitration, noting that "domestically constituted arbitration panels, but not any 'interested party,' can invoke federal court jurisdiction to compel discovery." *Id.* at 883. "It is not likely that Congress would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded in its domestic dispute-resolution counterpart." *Ibid.* It similarly is unlikely that Congress would implement careful procedures (under Section 6203) under which assistance to the *Directorate* might be permitted at this pre-complaint stage of the proceedings, but leave district courts unfettered discretion to grant *private parties* access to discovery (under Section 1782).

III. Section 1782 Does Not Authorize Circumvention of Foreign Tribunals' Limitations on Discovery

This Court should adopt the position of the First and Eleventh Circuits requiring that "the information sought in the United States would be discoverable under foreign law." *In re*

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[9] Section 6203 was enacted as part of the International Antitrust Enforcement Assistance Act of 1994, Pub. L. 103-488. The Senate Report accompanying the legislation cites testimony from a range of corporate interests, including *amicus curiae* Chamber, which supported the legislation and expressed concerns about protecting sensitive information from improper disclosure. S. REP. NO. 103-388, 103d Cong., 2d Sess., at 5 (1994). It strains credulity to believe that Congress took pains to protect the privacy of companies subject to investigation where international antitrust cooperation was concerned, but left untouched Section 1782, which under the Ninth Circuit's interpretation allows unchecked discovery by private parties.

Application of Asta Medica, S.A., 981 F.2d 1, 2, 7 (1st Cir. 1992); see *Trinidad and Tobago*, 848 F.2d at 1156.[10] This interpretation gives effect to Congress's expressed intent to "bring[] the United States to the forefront of nations adjusting their procedures to those of sister nations" – with the goal of "invit[ing] foreign countries similarly to adjust their procedures." 1964 U.S.C.C.A.N. at 3783. In the related context of the Hague Evidence Convention, this Court expressed confidence that other sovereigns' courts would respect *U.S.* discovery rules. See *Société Nationale Industrielle Aérospatiale* v. *U.S. District Court*, 482 U.S. 522, 542 (1987) ("It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions, and we are satisfied that foreign tribunals will recognize that the final decision on the evidence to be used in litigation conducted in American courts must be made by those courts."). In similar regard, Section 1782 should be interpreted to require U.S. courts to have respect for *other* jurisdictions' discovery rules.

But there is more. Respondent would not be entitled to the information sought in this case under U.S. discovery rules. Except in rare circumstances not implicated here, there is no discovery under the Federal Rules of Civil Procedure without first filing a civil action. See *In re Application of National Broadcasting Co.*, No. M-77 (RWS), 1998 WL 19994, at *7

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[10] The Ninth Circuit "[found] nothing in the plain language * * * of Section 1782 * * * to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." But the judicial assistance permitted by Section 1782 is for discovery of documents or testimony "*for use in* a proceeding in a foreign or international tribunal." (emphasis added). It is difficult to imagine how materials not discoverable in the foreign proceeding could be "for use in" that proceeding. This understanding also is informed by Congress's choice of the phrase "*in connection with* a proceeding in a foreign or international tribunal" (emphasis added) in Section 1696. Had Congress employed that broader phrase in Section 1782 as well as in Section 1696, it might have justified the Ninth Circuit's rule, but Congress did not do so.

(S.D.N.Y. Jan. 21, 1998) (noting that discovery under the Federal Rules is limited to parties to an action (per Rule 26(b)(1)) or – in limited circumstances – to a person who desires to "'perpetuate testimony'" and who "expects to be a party in such an action" (per Rule 27(a)). Respondent has done nothing more than file a complaint with an antitrust enforcement agency. If the Ninth Circuit's interpretation of Section 1782 were correct, Congress would have enacted a discovery regime that is not based either in the laws of the foreign sovereign where the proceeding justifying the discovery is taking place, or in the laws of the United States. Congress's intent, expressed in the legislative history and uniformly interpreted by the courts, was to encourage foreign courts to have reciprocal respect for U.S. litigation procedures. 1964 U.S.C.C.A.N. at 3783; see Pet. App. 8a. No reason exists for Congress to enact a scheme permitting judicial "assistance" to a degree that even the liberal rules of discovery in the U.S. (see *Aérospatiale*, 482 U.S. at 542) could not possibly justify.

And the statute that Congress enacted must not be broadened based on some misguided notions of comity. As the European Commission explained in its certiorari-stage *amicus* brief to this Court, the Ninth Circuit's interpretation of Section 1782, far from "providing efficient assistance to participants in international litigation" (Pet. App. 8a (citing *Malev*, 964 F.2d at 100)), actually will *undermine* foreign antitrust enforcement efforts. Like the Antitrust Division, the EU Competition Commission has adopted a corporate leniency policy, whereby it encourages members of cartels subject to that agency's jurisdiction voluntarily to expose the cartel. EC Br. 6 (Nov. 12, 2002). Compare *Corporate Leniency Policy*, 4 Trade Reg. Rep. (CCH) ¶ 13,113, at 20,649-21, 20,649-22 (Aug. 10, 2003) (Antitrust Division Corporate Leniency Policy). And, like the U.S. policy, the Commission's leniency program has been highly successful. On December 10, the Competition Commission levied €70 million in fines against members of a cartel that was exposed under the amnesty policy. *EU Imposes Almost €70 Million in Fines for Organic Peroxide Cartel Over*

29 Years, Vol. 85 ISSN No. 2135 (Dec. 12, 2003). The Ninth Circuit's rule "could undermine the EC's Leniency Program by destroying the confidentiality of submissions to the Commission and thereby deterring companies from coming forward in the first place with vital information about illegal cartel activity." Deputy Assistant Attorney General Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications* 13-14 (Nov. 18, 2003), available at http://www.usdoj.gov/atr/public/speeches/201509.pdf (*Delrahim Remarks*).

As the First Circuit correctly predicted in *In re Application of Asta Medica, S.A.*, 981 F.2d at 6 "foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws."[11] Indeed, at page 13 of its merits-stage *amicus* brief filed December 23, 2003, the Commission "object[ed] to the potential subversion of limits that the European Union has imposed * * * on access by an antitrust complainant to the information that the Commission gathers in its investigation."

In *Empagran*, the court of appeals reached a comparable result – also from a misguided hyper-extension of policies

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[11] The Acting Solicitor General tepidly responds that, "[e]ven when the requesting entity is a private party, the unavailability of discovery under foreign law *does not necessarily* imply that foreign tribunals would take offense at the application of Section 1782." U.S. Br. 11 (Oct. 6, 2003) (emphasis added). But it is not plausible that a Congress palpably concerned with international comity left to the case-by-case discretion of hundreds of district judges the decision to do something that probably would – but "does not necessarily" – offend a foreign court. It is a particularly strained interpretation of the will of Congress to conclude simultaneously *both* that private non-litigants before a non-tribunal can invoke Section 1782, *and* that they are not limited to discovering that which would be discoverable under foreign law. The Acting Solicitor General notably does not believe that such discovery really should be authorized (*id.* at 18) but implausibly attributes to Congress the intention to leave these delicate questions to the discretion of district courts.

underlying a statutory scheme. In *Empagran*, the D.C. Circuit relied primarily on a deterrence rationale as justification for permitting worldwide plaintiff classes under the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, including plaintiffs whose injuries occurred in transactions having no nexus to the United States. In a brief urging rehearing, the Solicitor General and the Antitrust Division argued that the increase in potential liability threatened the opposite effect from deterrence. Because companies that break from and expose a cartel remain civilly liable, increasing civil liability has the perverse effect of cementing cartels by making it more costly for a cartel member to break from the cartel under the Justice Department amnesty policy.

Of course, disincentives also arise, threatening the Antitrust Division's leniency policy, if *foreign countries* adopt policies that somehow make it more expensive for members of cartels with impacts on U.S. commerce to take advantage of the leniency policy. The comity rationale that the Ninth Circuit blithely cited in support of "liberal discovery" rules (Pet. App. 8a) ignores the equal importance of mutual respect for sovereigns' decisions how to enforce, and how not to enforce, their laws. See *In re Application for an Order for Judicial Assistance in a Foreign Proceeding*, 147 F.R.D. 223, 225 (C.D. Cal. 1993) ("The intent behind [Section 1782] was to * * * maintain respect for foreign countries' sovereign jurisdiction."), overruled by *Advanced Micro Devices, Inc.* v. *Intel Corp.*, 292 F.3d 664 (9th Cir. 2002) (see Pet. App. 9a n.4). The Ninth Circuit's rule risks encouraging other countries to adopt procedures that undermine the judicial processes of the United States. See *Asta Medica*, 981 F.2d at 7 ("[T]he broader goal of the statute – stimulating cooperation in international and foreign litigation – would be defeated since foreign jurisdictions would be reluctant to enact policies similar to Section 1782."). That result would be inimical to Congress's intent in enacting Section 1782, which was to "bring[] the United States to the forefront of nations adjusting their procedures to those of sister nations." 1964 U.S.C.C.A.N. at 3783.

Also like the D.C. Circuit in *Empagran*, a case that raised international concern by imposing U.S. antitrust laws and policies on foreign nations (see *Delrahim Remarks*, *supra*, at 9-10), the Ninth Circuit has made the uniquely liberal U.S. discovery system the choice option for litigants in foreign countries. Such a race-to-the-bottom approach will inevitably have the effect of encouraging global forum shopping and making the most liberal legal system the worldwide standard. Congress enacted both the FTAIA and Section 1782 to *enhance* international comity. The effect that these decisions threaten – making the United States the *de facto* courtroom to the world – was a result that Congress never intended.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

INTEL CORPORATION, PETITIONER

v.

ADVANCED MICRO DEVICES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTIONS PRESENTED

Section 1782 of Title 28 of the United States Code provides that a district court may order the production of documents or testimony "for use in a proceeding in a foreign or international tribunal" upon request "by a foreign or international tribunal or upon the application of any interested person." The questions presented are:

1. Whether Section 1782 authorizes a district court to order production of materials, for use in a foreign tribunal, when the foreign tribunal itself would not compel production of the materials.

2. Whether Section 1782 authorizes production of materials for presentation in an anti-competitive practices investigation by the Commission of the European Communities, on the theory that the investigation will lead to "a proceeding in a foreign or international tribunal."

3. Whether, for purposes of Section 1782, a party that files a complaint with the Commission of the European Communities is an "interested person."

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper construction of 28 U.S.C. 1782, which authorizes federal district courts to provide foreign tribunals and interested persons with assistance in obtaining evidence for use in foreign proceedings. Section 1782 plays an important role in encouraging international cooperation, facilitating the resolution of foreign disputes, and fostering international comity. The United States utilizes Section 1782 to present to courts letters rogatory and letters of request, received through the Department of State or the Department of Justice. See, *e.g.*, *In re Letter Rogatory from the First Court of First Instance in Civil Matters, Caracas, Venez.*, 42 F.3d 308, 309 (5th Cir. 1995). The United States also employs Section 1782 to execute requests from foreign governments for witnesses or evidence in criminal matters under Mutual Legal Assistance Treaties (MLATs). See, *e.g.*, *In re Commissioner's Subpoenas*, 325 F.3d 1287, 1290-1291 (11th Cir. 2003). At the Court's invitation, the United States filed a brief amicus curiae in response to the petition for a writ of certiorari. The

United States submits that Section 1782 authorizes, but does not require, a federal district court to provide judicial assistance in this case and that the Court should remand the case for the district court to determine whether such assistance is appropriate.

STATEMENT

Petitioner Intel Corporation and respondent Advanced Micro Devices, Inc. (AMD) compete in the development and sale of microprocessors throughout the world, including within the European Community. AMD filed a complaint with the Directorate-General for Competition (DG-Competition) of the Commission of the European Communities (European Commission) alleging that Intel was abusing its dominant market position in violation of Article 82 of the Treaty Establishing the European Community, consolidated version published in 2002 O.J. (C.325) 33 (EC Treaty). Pet. App. 2a. AMD then applied to the United States District Court for the Northern District of California for an order requiring Intel to produce materials in this country pursuant to 28 U.S.C. 1782(a), which authorizes a district court, upon the request of a "foreign or international tribunal or upon the application of any interested person," to order production of testimony, documents, or other thing "for use in a proceeding" in the tribunal. 28 U.S.C. 1782. The district court denied AMD's request on the ground that the European Commission's ongoing investigation is not a "proceeding" within the meaning of Section 1782. Pet. App. 13a-15a. The court of appeals reversed. *Id.* at 1a-9a. That court ruled that the proceeding for which discovery is sought "is, at a minimum, one leading to quasi-judicial proceedings" and that Section 1782 does not impose "a threshold requirement that the material also be discoverable in the foreign court." *Id.* at 2a, 6a; see *id.* at 3a-9a. Intel challenges the court of appeals' decision.

A. Section 1782's History And Background

Section 1782 is the product of congressional efforts, over the span of nearly 150 years, to provide means to assist foreign tribunals in obtaining evidence for use in their proceedings.[1]

1. In 1855, the Attorney General of the United States concluded that United States courts lacked statutory authority to execute a letter rogatory, submitted from an official of the French government to the State Department, seeking assistance in securing testimony for a French proceeding. See 7 Op. Att'y Gen. 56 (1855); Harry L. Jones, *International Judicial Assistance: Procedural Chaos and a Program for Reform*, 62 Yale L.J. 515, 540 (1953). The following year Congress gave federal courts the authority to assist foreign courts by appointing commissioners to compel testimony from witnesses identified in letters rogatory. Act of Mar. 2, 1855, ch. 140, § 2, 10 Stat. 630. See Jones, *supra*, 62 Yale L.J. at 540.

Because of indexing errors, Congress's 1855 legislation was "buried in oblivion" and the courts apparently were unaware of its existence. See Jones, *supra*, 62 Yale L.J. at 540-541. Eight years later, Congress enacted new legislation governing discovery requests from foreign courts. Act of Mar. 3, 1863, ch. 95, § 1, 12 Stat. 769. The new legislation authorized federal courts to respond to letters rogatory by compelling witnesses in the United States to provide testimony for use in foreign courts. That assistance was available, however, only if the foreign proceedings were "for the recovery of money or property depending in any court in any foreign country with which the United States are at

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[1] The relevant statutory provisions are set forth in the appendix to this brief. See Add., *infra*, 1a-5a.

peace, and in which the government of such foreign country shall be a party or shall have an interest." 12 Stat. at 769.[2]

2. In 1948, Congress substantially broadened the scope of federal court assistance available for foreign proceedings. See Act of June 25, 1948, ch. 646, § 1782, 62 Stat. 949. Congress extended federal judicial assistance to "any civil action pending in any court in a foreign country" and eliminated the requirement that the government of a foreign country be a party or have an interest in the proceedings. See § 1782, 62 Stat. 949. The following year, Congress replaced the term "civil action" with the phrase "judicial proceeding." Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103. Thus, by 1949, federal courts were authorized to compel the testimony of any witness located in the United States to be used in a pending foreign judicial proceeding, but only proceedings in those countries with which the United States was at peace. See 28 U.S.C. 1782 (1952). See Jones, *supra*, 62 Yale. L.J. at 541-542.

3. In 1958, Congress concluded that "[t]he extensive increase in international, commercial and financial transactions involving both individuals and governments and the resulting disputes, leading sometimes to litigation, has pointedly demonstrated the need for comprehensive study of the extent to which international judicial assistance can be obtained." S. Rep. No. 2392, 85th Cong., 2d Sess. 3 (1958).

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[2] In 1877, Congress added language to Revised Statutes § 875, similar to that used in the Act of March 2, 1855, providing assistance for foreign governments in cases in which they were parties or had an interest. See Act of Feb. 27, 1877, ch. 69, 19 Stat. 241. At the same time, Revised Statutes §§ 4071-4073 (1875 ed.), drawn from part of the 1863 legislation, set out more limited circumstances in which a foreign government could obtain assistance in United States courts. "These two sets of statutes remained separate until 1948 when they were revised and consolidated at 28 U.S.C. § 1781 et seq. (62 Stat. 949)." *In re Letter Rogatory from the Justice Court, Dist. of Montreal, Canada*, 523 F.2d 562, 564 n.5 (6th Cir. 1975).

Congress therefore created the Commission on International Rules of Judicial Procedure to investigate and recommend improvements to "existing practices of judicial assistance and cooperation between the United States and foreign countries." Act of Sept. 2, 1958, Pub. L. No. 85-906, § 2, 72 Stat. 1743.[3]

The Commission drafted and recommended adoption of (1) amendments to the Federal Rules of Civil and Criminal Procedure, (2) amendments to sections of the United States Code, and (3) a Uniform Interstate and International Procedure Act, to be enacted by individual States. See *Fourth Annual Report of the Commission on International Rules of Judicial Procedure*, H.R. Doc. No. 88, 88th Cong., 1st Sess. 2 (1963). In 1964, without debate, Congress unanimously adopted the legislation recommended by the Commission. Act of Oct. 3, 1964, Pub. L. No. 88-619, § 9, 78 Stat. 997; see H.R. 9435, 88th Cong., 2d Sess. (1964), *reprinted in* 110 Cong. Rec. 596-598, 22,857 (1964).[4]

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[3] Congress charged the Commission with, *inter alia*, drafting legislation to render "more readily ascertainable, efficient, economical, and expeditious" those "procedures necessary or incidental to the conduct and settlement of litigation in State and Federal Courts and quasi-judicial agencies which involve the performance of acts in foreign territory, such as the service of judicial documents, the obtaining of evidence, and the proof of foreign law," and to accomplish the same result for "the procedures of our State and Federal tribunals for the rendering of assistance to foreign courts and quasi-judicial agencies." § 2, 72 Stat. 1743.

[4] The legislation to improve international processes included, *inter alia*, amendments to 28 U.S.C. 1781(b), which authorizes the State Department to receive, and return after execution, both foreign and domestic letters rogatory and similar requests, while making clear that other means of transmittal continue to be available. See § 8, 78 Stat. 996. The legislation also included the new provisions of 28 U.S.C. 1696, which gives district courts discretionary authority to grant or deny requests for assistance in effecting service of documents issued in connection with proceedings in foreign or international tribunals, and 28 U.S.C. 1783(a), which gives district courts discretion, under certain circumstances, to issue a subpoena requiring the appearance of a United States national or resident who is in a foreign country. See §§ 4, 10, 78 Stat. 995, 997.

The 1964 legislation included a complete revision of Section 1782. Section 1782, as amended, provided that federal district courts "may order" the production of documents or testimony "for use in a proceeding in a foreign or international tribunal," upon request by "a foreign or international tribunal or upon the application of any interested person." See Act of Oct. 3, 1964, § 9(a), 78 Stat. 997. The amended Section 1782 deleted language in the 1949 version that had limited assistance to a "judicial proceedings pending in any court in a foreign country with which the United States is at peace." Compare 28 U.S.C. 1782 (1958), with § 9(a), 78 Stat. 997. The Senate Report that accompanied the legislation stated that Congress substituted the word "tribunal" to ensure that "assistance is not confined to proceedings before conventional courts," but also extends to "administrative and quasi-judicial proceedings all over the world," including "proceedings * * * pending before investigative magistrates in foreign countries." S. Rep. No. 1580, 88th Cong., 2d Sess. 7-8 (1964); see also H.R. Rep. No. 1052, 88th Cong., 1st Sess. 9 (1963); see generally Hans Smit, *International Litigation Under the United States Code*, 65 Colum. L. Rev. 1015, 1026-1035 (1965).[5]

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[5] The 1964 legislation also repealed prior enactments that had authorized judicial assistance to international tribunals established by a treaty to which the United States was a party involving claims in which the United States or its nationals were interested. See 22 U.S.C. 270-270g (1958) (repealed Act of Oct. 3, 1964, § 3, 78 Stat. 995). Those prior enactments had given the tribunals and their commissioners authority to administer oaths in proceedings involving such claims and permitted agents of the United States before the international tribunal to invoke the assistance of the district court in compelling the production of documents. See Act of July 3, 1930, ch. 851, 46 Stat. 1005, as amended by the Act of June 7, 1933, ch. 50, 48 Stat. 117. Section 1782's amended provisions were viewed as sufficiently broad to provide assistance in those circumstances. See S. Rep. No. 1580, *supra*, at 3-4, 8; Smit, *supra*, 65 Colum. L. Rev. at 1027.

The Senate Report emphasized that Section 1782 authorized, but did not require, district courts to provide judicial assistance, stating:

> In exercising its discretionary power, the court may take into account the nature and attitudes of the government of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of the tribunal and the character of the proceedings before it. The terms the court may impose include provisions for fees for opponents' counsel, attendance fees of witnesses, fees for interpreters and transcribers and similar provisions.

S. Rep. No. 1580, *supra*, at 7; see also Smit, *supra*, 65 Colum. L. Rev. at 1029.

4. In 1996, Congress amended Section 1782(a) to modify the reference to "foreign or international tribunal" in the first sentence by adding the phrase "including criminal investigations conducted before formal accusation." National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 1342(b), 110 Stat. 486. That revision produced the current version of Section 1782 at issue in this case. See Hans Smit, *American Assistance to Litigation in Foreign and International Tribunals: Section 1782 of Title 28 of the U.S.C. Revisited*, 25 Syracuse J. Int'l L. & Comm. 1, 20 n.89 (1998).

B. The European Commission Proceedings

The European Commission describes itself as "the executive and administrative organ of the European Communities." Br. of Amicus Curiae European Commission Supporting Reversal 1 (EC Merits Amicus Br.). It exercises responsibility over a wide range of subject areas, including the EC Treaty's provisions relating to competition. *Ibid.* The European Commission's DG-Competition enforces those

treaty provisions, which include provisions addressing anti-competitive agreements (Art. 81) and abuse of dominant market position (Art. 82). *Id.* at 1-2; see also Br. of the European Commission as Amicus Curiae in Support of Petitioner 1-2, 4-5 (EC Pet. Amicus Br.).

1. The DG-Competition's "overriding responsibility" is to conduct investigations into alleged violations of those competition laws. EC Merits Amicus Br. 6. On receipt of a complaint or sua sponte, the DG-Competition conducts a preliminary investigation. It "may take into account information provided by a complainant, and it may seek information directly from the target of the complaint." *Ibid.* "Ultimately, DG Competition's preliminary investigation results in a formal written decision whether to pursue the complaint. If it declines to proceed, that decision is subject to judicial review." *Id.* at 7. See generally *Hasselblad (G.B.) Ltd.* v. *Orbison*, [1985] Q.B. 475, 495-496 (C.A. 1984). The decision is subject to review by the Court of First Instance and, ultimately, by the Court of Justice for the European Communities, which is the court of last resort for European Community matters. *See ibid.*; *Stork Amsterdam BV* v. *European Community Comm'n*, [2000] 5 C.M.L.R. 31, 42 (Ct. First Instance); *Koelman* v. *European Community Comm'n*, [1996] 4 C.M.L.R. 636, 649 (Ct. First Instance); Pet. App. 3a-4a.

2. If the DG-Competition decides to pursue the matter further, it typically serves the target with a formal "statement of objections" and advises the target of its intention to recommend a decision finding that the target has violated the relevant competition laws. EC Merits Amicus Br. 7. The target is entitled to a hearing before a hearing officer, who provides a report to the DG-Competition. *Ibid.*; Pet. App. 4a. Once the DG-Competition has made its recommendation, the European Commission may "dismiss[] the complaint, or issue[] a decision finding infringement and

imposing penalties as appropriate." EC Merits Amicus Br. 7. That action is also subject to judicial review. *Ibid.* See generally *Hasselblad*, [1985] Q.B. at 496. Although the European Commission "has significant responsibilities that may partake of an adjudicatory character," EC Pet. Amicus Br. 4, "neither DG Competition nor the Commission as a whole is ever engaged in adjudicating rights as between private parties," EC Merits Amicus Br. 7.

C. The Proceedings In This Case

Intel and AMD are United States companies that are "worldwide competitors in the microprocessor industry." Pet. App. 2a. AMD filed a complaint with the European Commission's DG-Competition, alleging that Intel was abusing its dominant position in the European Common Market, in violation of the EC treaty and European Community regulation. *Ibid.* The DG-Competition's investigation is at the preliminary stage. *Ibid.*

1. AMD recommended that the DG-Competition seek discovery of documents that Intel previously produced in discovery in a United States antitrust dispute, *Intergraph Corp.* v. *Intel Corp.*, 3 F. Supp. 2d 1255 (N.D. Ala. 1998), vacated, 195 F.3d 1346 (Fed. Cir. 1999), on remand, 88 F. Supp. 2d 1288 (N.D. Ala. 2000), aff'd, 253 F.3d 695 (Fed. Cir. 2001). See Pet. App. 2a-3a, 13a; J.A. 111. After the DG-Competition declined to do so, AMD petitioned in federal district court for an order directing Intel to produce the documents at issue pursuant to 28 U.S.C. 1782. Pet. 6; Pet. App. 13a. AMD asserted that it sought the materials in connection with the complaint it had filed with the European Commission. *Ibid.*

2. The district court denied the application based on its perception of the European Commission's proceedings. Pet. App. 13a-15a. The court reasoned that Section 1782 applies only to foreign proceedings "in which an 'adjudicative function is exercised.'" *Id.* at 14a-15a (quoting *Lancaster Factor-*

ing Co. v. *Mangone*, 90 F.3d 38, 41 (2d Cir. 1996)). Relying on "the record now before the court," and focusing specifically on a declaration from a United States legal practitioner and a 1981 European Commission report on competition policy, the court concluded that AMD's application was "not supported by applicable authority." *Ibid.*

3. The court of appeals reversed. Pet. App. 1a-9a. The court of appeals observed at the outset that Section 1782 authorizes federal courts, through "broad and inclusive" language, to assist foreign proceedings. *Id.* at 5a. That assistance extends "by way of example even [to] criminal investigations prior to formal accusation." *Ibid.* The court observed that Section 1782's text does not distinguish "between civil and criminal proceedings." *Ibid.* In addition, the court noted, Section 1782's legislative history indicates that it authorizes assistance to "'bodies of a quasi-judicial or administrative nature' as well as preliminary investigations leading to judicial proceedings." *Ibid.* (quoting *In re Letters Rogatory from the Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216, 1218 (9th Cir. 1976)).

The court of appeals reasoned that, because the DG-Competition's preliminary investigation can ultimately result in an enforceable administrative decision that is subject to judicial review, in this instance "the proceeding for which discovery is sought is, at minimum, one leading to quasi-judicial proceedings." Pet. App. 6a. The court concluded, based on Congress's 1964 amendments eliminating Section 1782's prior reference to "pending" proceedings, that those proceedings need not be "imminent." *Ibid.* (citing *United States* v. *Sealed 1*, 235 F.3d 1200, 1205 (9th Cir. 2000)). "Although preliminary, the process qualifies as a 'proceeding before a tribunal' within the meaning of 28 U.S.C. § 1782." *Id.* at 7a.

The court of appeals also rejected Intel's argument that AMD cannot obtain discovery under Section 1782 unless it makes a threshold showing that it could obtain the materials

at issue in the European Commission proceeding. Pet. App. 7a-8a. The court acknowledged disagreement among other courts of appeals on that issue. *Ibid.* The court concluded, however, that neither the text nor the legislative history of Section 1782 "require[s] a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." *Id.* at 8a. The court reasoned that rejection of a foreign discoverability requirement is consistent with Section 1782's twin aims of "providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." *Ibid.* (citing *In re Application of Malev Hungarian Airlines*, 964 F.2d 97 (2d Cir.), cert. denied, 506 U.S. 861 (1992)). The court of appeals accordingly remanded the case for the district court to consider AMD's discovery request on the merits. *Id.* at 9a.

SUMMARY OF ARGUMENT

Section 1782 grants district courts broad authority to assist foreign proceedings, but it also grants those courts discretion to withhold such assistance when reason and judgment counsel that course. The court of appeals was correct in concluding that Section 1782 does not categorically prohibit the district court from providing assistance in this case, but the absence of such a prohibition does not prevent the district court from withholding assistance on remand as a matter of discretion based on the considerations that petitioner and its amici have identified as absolute obstacles to the use of Section 1782.

1. Section 1782 authorizes federal courts to order the production of documents or testimony "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation," upon request of the tribunal or "upon application of any interested person." 28 U.S.C. 1782. Section 1782's use of the term "tribunal" indicates that Section 1782 authorizes fed-

eral courts to assist both foreign courts and foreign administrative bodies that exercise quasi-judicial functions. Section 1782's inclusion, by example, of "criminal investigations conducted before formal accusation," and its purposeful omission of any requirement of a pending adjudication, indicate that the foreign proceedings can include government investigations that will lead to an adjudication. And Section 1782's reference to requests by "any interested person" indicates that federal courts are not barred from considering requests for production from persons who, while not formal parties, are entitled to participate in those foreign proceedings. The court of appeals accordingly was correct in ruling that Section 1782 does not categorically preclude the district court from providing assistance to a complainant in a European Commission proceeding that will ultimately result in an adjudication.

2. Section 1782 expressly prohibits a federal court from ordering production of materials in violation of "any legally applicable privilege." 28 U.S.C. 1782. But Section 1782 contains no provision that would categorically prohibit the federal court from ordering production of materials simply because the foreign tribunal or the interested person would not be able to obtain them if they were located in the foreign jurisdiction. The existence of such a categorical requirement cannot be inferred from "comity" or "parity" concerns because neither of those concerns necessarily supports a "foreign discoverability" requirement. Nor can such a requirement be inferred from United States discovery practices. The court of appeals accordingly was correct in refusing to rule that Section 1782 imposes a categorical "foreign discoverability" requirement.

3. Section 1782, which states that a district court "may" provide the requested assistance, grants discretionary authority. 28 U.S.C. 1782. Section 1782 recognizes and preserves a district court's traditionally broad powers to deter-

mine whether, to what extent, and on what conditions, to compel testimony or the production of materials. Petitioner and its amici raise a number of considerations that may provide persuasive reasons for the district court to decline to compel production in this case. Furthermore, some of those considerations may ultimately provide the basis for reviewing courts to articulate supervisory rules to guide a district court's exercise of its discretion. But the courts below have not yet evaluated those considerations in the context of this particular dispute, and this Court should await that effort before announcing far-reaching principles that may prove unnecessary to resolve this case.

ARGUMENT

Petitioner contends that Section 1782 does not authorize discovery that would otherwise be unavailable to private non-litigants under both United States and foreign law (Pet. Br. 19-27) and that discovery is inappropriate because there is no live "proceeding in a foreign or international tribunal" (*id.* at 27-33). These contentions should be rejected as inconsistent with the text and statutory evolution of Section 1782. For economy in exposition, the United States will address the meaning of a "proceeding in a foreign or international tribunal" (pp. 14-20, *infra*) before turning to the petitioner's assertion of a "foreign discoverability" requirement (pp. 21-26, *infra*). Petitioner also contends, in the alternative, that this Court should exercise its supervisory authority to impose rules of practice in the application of Section 1782 (Pet. Br. 34-38). The United States submits that, while such rules may ultimately have merit, this Court should allow the lower courts to formulate such rules in the first instance (pp. 26-30, *infra*).

I. SECTION 1782 AUTHORIZES, BUT DOES NOT REQUIRE, A FEDERAL DISTRICT COURT TO PROVIDE JUDICIAL ASSISTANCE TO A COMPLAINANT IN A EUROPEAN COMMISSION PROCEEDING THAT WILL ULTIMATELY RESULT IN AN ADJUDICATION

This Court has emphasized that "in all statutory construction cases, we begin with the language of the statute." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Section 1782's operative terms have a readily ascertainable meaning, confirmed by context and legislative history, that prescribes the statute's reach. Section 1782 authorizes, but does not require, a federal district court to provide judicial assistance to a complainant in a European Commission proceeding that will ultimately result in an adjudication. In challenging the court of appeals' ruling, petitioner and its amici have no adequate textual answer to the court of appeals' straightforward construction of the statutory language.

A. Congress Used The Term "Foreign Or International Tribunal" To Encompass Administrative Bodies, Such As The European Commission, That Exercise Adjudicative Functions

Section 1782(a) expressly authorizes a district court to order a person to give testimony or produce documents "for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation." 28 U.S.C. 1782(a). The central limiting term is "tribunal," which can mean: "a court or forum of justice" or, more broadly, "something that decides or judges." *Webster's Third New International Dictionary* 2441 (1993). Under that definition, the term "tribunal" in Section 1782 is not limited to courts but includes, more broadly, governmental bodies that exercise adjudicative functions.

The legislative history confirms that construction. The 1949 version of Section 1782 authorized judicial assistance in aid of "any judicial proceeding pending in any court in a foreign country." 28 U.S.C. 1782 (1958). In 1958, Congress directed the Commission on International Rules of Judicial Procedure to recommend procedural revisions "for the rendering of assistance to foreign courts *and quasi-judicial agencies*." Act of Sept. 2, 1958, § 2, 72 Stat. 1743 (emphasis added). See note 3, *supra*. The Commission accordingly recommended, and Congress enacted, amendments extending Section 1782 to "a proceeding in a foreign or international tribunal" (Add., *infra*, 4a-5a). The Senate Report stated that the amendment "clarifies and liberalizes U.S. procedures," explaining:

> The word "tribunal" is used to make it clear that assistance *is not confined* to proceedings before conventional courts. *For example*, it is intended that the court have discretion to grant assistance when proceedings are pending before investigating magistrates in foreign countries. * * * In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before *a foreign administrative tribunal or quasi-judicial agency* as in proceedings before a conventional foreign court. Subsection (a) therefore provides the possibility of U.S. judicial assistance *in connection with all such proceedings*.

S. Rep. No. 1580, *supra*, at 7-8 (emphasis added). See *id.* at 9 (district courts may prescribe appropriate procedures "irrespective of whether the foreign or international proceeding or investigation is of a criminal, civil, administrative, or other nature").[6]

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[6] Professor Smit, the Reporter for the Commission on International Rules of Judicial Procedure, similarly stated in the "leading commentary"

The European Commission is a "foreign or international tribunal" within the meaning of Section 1782 because it exercises adjudicative functions. The Commission itself acknowledged, at the petition stage, that it "has significant responsibilities that may partake of an adjudicatory character." EC Pet. Amicus Br. 4. Most obviously, the European Commission is a governmental body that, in response to a complaint alleging anti-competitive conduct, may "issue[] a decision finding infringement and imposing penalties as appropriate." EC Merits Amicus Br. 7. The Commission points out that it does not "engage[] in adjudicating rights as between parties." *Ibid.* Nevertheless, the Commission, like criminal and civil courts and other administrative agencies, can adjudicate disputes between the government and private parties. See, *e.g.*, *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932). Such "special tribunals" (*ibid.*) exercise adjudicative functions and accordingly fall within the reach of Section 1782.[7]

(*In re Letter of Request from Crown Prosecution Serv.*, 870 F.2d 686, 690 (D.C. Cir. 1989) (R.B. Ginsburg, J.)) that the term "'tribunal' embraces all bodies exercising adjudicatory powers and includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil commercial, criminal, and administrative courts." Smit, *supra*, 65 Colum. L. Rev. at 1026 n.71.

[7] The European Commission urges that the Court should reject that construction "to avoid inappropriately burdening the Commission." EC Merits Amicus Br. 16 (capitalization altered). Although the United States is sensitive to the Commission's policy concerns, Section 1782 unambiguously authorizes judicial assistance in aid of Commission proceedings. As Professor Smit specifically stated, contemporaneously with Section 1782's enactment, the statute "permits the rendition of proper aid in proceedings before the [European Economic Community] Commission in which the Commission exercises quasi-judicial powers." Smit, *supra*, 65 Colum. L. Rev. at 1027 n.73. There are other means, apart from an unduly narrow construction of Section 1782's terms, to address the Commission's policy concerns. See pp. 26-30, *infra*.

B. Congress Did Not Require That A Foreign Proceeding Be Pending At The Time Of The Request

Section 1782 does not limit district courts to providing judicial assistance for "pending" judicial or quasi-judicial proceedings. Rather, Section 1782's text makes clear that the statute authorizes district courts to compel the production of testimony and documents for use in an investigation that may lead to a governmental adjudication. Section 1782 specifically authorizes, as an example, judicial assistance in support of "criminal investigations conducted before formal accusation." 28 U.S.C. 1782(a).

Again, the legislative history confirms that construction. The 1949 version of Section 1782 limited judicial assistance to "any judicial proceeding *pending* in any court in a foreign country." 28 U.S.C. 1782 (1958) (emphasis added); see Add., *infra*, 4a; see also *id.* at 3a (1863 statute), 4a (1948 statute). Congress, however, eliminated the requirement that a proceeding be "pending" (as well as that it be a "judicial proceeding") in the 1964 version. See *id.* at 4a-5a. Congress's deletion of that key limitation cannot reasonably be dismissed as inadvertent, especially when the meaning of the resulting text is plain. See, *e.g.*, *Stone* v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect."). Rather, Congress recognized that judicial assistance would be available "whether the foreign or international proceeding *or investigation* is of a criminal, civil, administrative, or other nature." S. Rep. No. 1580, *supra*, at 9. (emphasis added).[8]

Section 1782 accordingly authorizes a federal district court to provide assistance at the preliminary investigative stage

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[8] See Smit, *supra*, 65 Colum. L. Rev. at 1026 ("It is not necessary, however, for the proceeding to be pending at the time the evidence is sought, but only that the evidence is eventually to be used in such a proceeding.").

of the European Commission's proceedings. Section 1782 does not require that the judicial or quasi-judicial proceeding for which assistance is sought be "pending at the time of the request for assistance." *In re Letter of Request from Crown Prosecution Serv.*, 870 F.2d 686, 687 (D.C. Cir. 1989) (R.B. Ginsburg, J.); see *id.* at 690, 694; see also *In re Letters Rogatory from the Tokyo Dist., Tokyo, Japan*, 539 F.2d 1216, 1218 (9th Cir. 1976) (joined by Kennedy, J.) (allowing discovery "for use in completion of the investigation and in future trials"); But cf. *In re Request for International Judicial Assistance (Letter Rogatory) for the Federative Republic of Brazil*, 936 F.2d 702, 705-706 (2d Cir. 1991) (requiring that the proceeding must be "very likely to occur").

C. Congress Used The Term "Any Interested Person" To Encompass Persons Who, While Not Parties, Nevertheless Are Participants In The Foreign Proceedings

Section 1782(a) authorizes a district court to provide judicial assistance "pursuant to a letter rogatory, or request made, by a foreign or international tribunal or *upon application of any interested person.*" 28 U.S.C. 1782(a) (emphasis added). The phrase "any interested person," in ordinary and legal parlance, is inclusive and encompasses, at the least, persons who have initiated, and are entitled to participate in, an investigative proceeding that may lead, in the ordinary course, to an adjudication before the foreign or international tribunal.[9]

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[9] See, *e.g.*, 5 U.S.C. 555(b) ("So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function."); 28 U.S.C. 1822 ("Any person interested in a share of any fine, penalty or forfeiture incurred under any Act of Congress, may be examined as a witness in any proceeding for the recovery of such fine, penalty or forfeiture by any party thereto."); see also 22 U.S.C. 270-270e (1958) (distin-

Petitioner suggests that, because the caption of Section 1782 refers to "litigants before [foreign and international] tribunals," the phrase "any interested party" should be correspondingly construed to reach only such "litigants." Pet. Br. 24. This Court has cautioned, however, that the captions of statutes, which frequently employ shorthand terminology, "cannot undo or limit that which the text makes plain." *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947). In this instance, the text of the statute employs words that, by their plain terms, are unambiguously broader than the words the caption employs. The caption accordingly provides little guidance beyond the obvious implication that "litigants" are included among (and may be the most common example of) the "interested persons" who may invoke Section 1782. See, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 483 (2001).

Section 1782's legislative history confirms that the statute authorizes federal district courts to provide assistance upon the application of persons other than litigants. The Senate Report states that a request for judicial assistance may "be made in a direct application by an interested person, *such as* a person designated by or under a foreign law, *or* a party to the foreign or international litigation." S. Rep. No. 1580, *supra*, at 8 (emphasis added). That statement indicates that a "litigant" is only one of a variety of "interested persons."[10]

A complainant in the European Commission's proceedings qualifies as an "interested person" within the meaning of Section 1782. The complainant participates, in a substantial

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guishing between governmental party claimants before an international tribunal and persons who are "interested" in those claims).

[10] Professor Smit's authoritative commentary additionally states that the term "any interested person" is "intended to include not only litigants before foreign or international tribunals, but also foreign and international officials as well as any other person whether he be designated by foreign law or international convention or merely possess a reasonable interest in obtaining the assistance." 65 Colum. L. Rev. at 1027.

way, in the Commission's proceedings by initiating the investigation through filing a complaint, by submitting information that the Commission must consider, and by pursuing the option of judicial review if the Commission discontinues an investigation or dismisses the complaint. See EC Merits Amicus Br. 7. That role is sufficient to qualify the complainant as an "interested person" within any reasonable conception of that term.[11]

In sum, Section 1782 authorizes a federal district court to provide judicial assistance to a complainant in a European Commission proceeding that will ultimately result in an adjudication. Significantly, Section 1782 only authorizes such assistance—the statute does not require it. The district court retains discretion to consider whether rendering such assistance is appropriate in light of such factors as the nature and timing of the proceeding and the role of the entity seeking the assistance. See pp. 26-30, *infra*.

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[11] Petitioner suggests that 28 U.S.C. 1696, which addresses international "service * * * of any document issued in connection with a proceeding in a foreign * * * tribunal," indicates that the term "interested person" should be confined to a "litigant." Pet. Br. 27. Petitioner reasons that "the class of private parties qualifying as 'interested persons' for those purposes *must* of course be limited to litigants, because private parties * * * cannot serve 'process' unless they have filed suit." *Ibid.* Section 1696, however, is not limited to service of *process*, but instead allows service of "any document" issued in connection with a foreign proceeding. For example, if the European Commission's procedures were revised to require a complainant to serve its complaint on a target company, but the complainant's role in the Commission's proceedings otherwise remained unchanged, Section 1696 would authorize the district court to provide that "interested party" with assistance in serving that document.

II. SECTION 1782 DOES NOT CATEGORICALLY PROHIBIT A DISTRICT COURT FROM ORDERING PRODUCTION OF MATERIALS SIMPLY BECAUSE THE FOREIGN TRIBUNAL OR THE INTERESTED PARTY WOULD NOT BE ABLE TO OBTAIN THEM IF THEY WERE LOCATED IN THE FOREIGN JURISDICTION

Section 1782 does not give federal district courts unlimited license to compel testimony or order the production of documents or other materials. Most significantly, Section 1782(a) expressly states that a district court may not order discovery "in violation of any legally applicable privilege." 28 U.S.C. 1782(a). That provision ensures that the targets of discovery retain relevant privileges that have an established basis in law. See S. Rep. No. 1580, *supra*, at 9. Section 1782 does not, however, categorically prohibit production of materials simply because the foreign tribunal or an interested party would not be able to obtain them if they were located in the jurisdiction where the foreign proceeding will take place.

A. Congress Did Not Impose A "Foreign Discoverability" Requirement

Just as Section 1782's scope depends on "the language of the statute," *Barnhart*, 534 U.S. at 450, Section 1782's affirmative limitations must be grounded in the statutory text. Section 1782 contains no language categorically limiting a district court to production of materials that could be produced in the foreign jurisdiction if the materials were located there. "If Congress had intended to impose such a sweeping restriction on the district court's discretion, at a time when it was enacting liberalizing amendments to the statute, it would have included statutory language to that effect." *In re Application of Gianoli Aldunate*, 3 F.3d 54, 59 (2d Cir.), cert. denied, 510 U.S. 965 (1993). Accord *Four Pillars Enters. Co.* v. *Avery Dennison Corp.*, 308 F.3d 1075, 1080 (9th Cir. 2002);

In re Application Pursuant to 28 U.S.C. § 1782, Bayer AG, Applicant-Appellant, to Take Discovery, 146 F.3d 188, 191-196 (3d Cir. 1998); *In re Order Permitting Metallgesellschaft AG to Take Discovery*, 121 F.3d 77, 79 (2d Cir. 1997); see also Pet. App. 8a-9a.[12]

There is likewise no indication in Section 1782's legislative history that Congress intended to impose categorical restrictions (apart from legally applicable privileges) or reciprocal conditions on the provision of assistance under Section 1782. Instead, Section 1782 "leaves the issuance of an appropriate order to the discretion of the court which, in proper cases, may refuse to issue an order or may impose conditions it deems desirable." S. Rep. No. 1580, *supra*, at 7.[13]

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[12] The only arguable bases in Section 1782's text for imposing such a requirement are provisions stating that: (1) the practice and procedure prescribed by the district court for taking testimony or producing evidence "may be in whole or part the practice and procedure of the foreign country or the international tribunal"; and (2) to the extent that the district court does not prescribe otherwise, testimony shall be taken "in accordance with the Federal Rules of Civil Procedure." 28 U.S.C. 1782(a). Those statutory provisions, however, by their terms, are permissive rather than restrictive. They serve as guides to the district court's exercise of its discretion; they do not impose substantive restrictions on the discovery to be had, let alone create a *per se* foreign discoverability limitation on all Section 1782 requests. See *In re Crown Prosecution Serv.*, 870 F.2d at 692 n.6 (noting that "[t]he district court retains discretion to prescribe other procedures" than those specified in the Federal Rules of Civil Procedure).

[13] For example, Professor Smit noted in his commentary that, under the laws of foreign countries such as the Netherlands and Italy, "parties may not be heard as witnesses and party statements are not considered testimony." Smit, *supra*, 65 Colum. L. Rev. at 1026 & n.68. He stated that "Section 1782 makes clear that the district court may order that parties and other persons, whose statements do not qualify as testimony under foreign practice, may be heard." *Id.* at 1026.

B. A "Foreign Discoverability" Requirement Cannot Be Inferred From "Comity" Or "Parity" Concerns

The two courts of appeals that have construed Section 1782 to include, implicitly, a foreign discoverability requirement have not provided a persuasive reason for doing so. The First Circuit rested its decision primarily on the policy concerns of avoiding offense to foreign governments and maintaining parity between litigants, *In re Application of Asta Medica, S.A.*, 981 F.2d 1, 5-7 (1992), while the Eleventh Circuit did not explain its rationale, see *In re Request for Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1156 (11th Cir. 1988), cert. denied, 488 U.S. 1005 (1989); *Lo Ka Chun* v. *Lo To*, 858 F.2d 1564, 1566 (11th Cir. 1988). While comity and parity concerns may provide legitimate touchstones for the district court's exercise of discretion, they do not provide a basis for inferring that Section 1782 implicitly contains a *per se* foreign discoverability rule.

Comity concerns provide a weak foundation for inferring that Section 1782 contains such a categorical rule because those concerns may actually *favor* production of the materials at issue. For example, if the requesting authority under Section 1782 is a foreign court or a foreign government enforcement authority, the federal district court should ordinarily evaluate that request without a potentially offensive inquiry into the lawfulness of the request under foreign law. See *In re Letter of Request from the Amtsgericht Ingolstadt, Federal Republic of Germany*, 82 F.3d 590, 592 (4th Cir. 1996); *Caracas*, 42 F.3d at 310-311; Comment, *How to Construe Section 1782: A Textual Prescription to Restore the Judge's Discretion*, 61 U. Chi. L. Rev. 1127, 1142 (1994).[14]

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[14] In this regard, the Eleventh Circuit has ruled that foreign government discovery requests made pursuant to an MLAT are subject only to those limitations set forth in the MLAT itself and are therefore not subject to a foreign discoverability requirement. See *Commissioner's Sub-*

Even when the requesting entity is a private party, the unavailability of discovery under foreign law does not necessarily imply that foreign tribunals would take offense at a district court's decision to order discovery in this country. The foreign tribunal's laws may limit discovery within its borders out of concerns that are peculiar to its legal practices, culture, or traditions, but have no analogue in the United States. See *In re Bayer*, 146 F.3d at 194. The application of a foreign discoverability rule would make little sense in that situation; rather, it would undermine Section 1782's objective to assist foreign tribunals in obtaining relevant information that the tribunals may find useful but, for reasons that have no bearing on international comity, they cannot obtain under their own laws. See *ibid.* A foreign tribunal's general reluctance to order production of materials present in the United States likewise provides no sound basis for a foreign discoverability rule because that reluctance may simply reflect that tribunal's desire to avoid offending *this* country. See *South Carolina Ins. Co.* v. *Assurantie Maatschappij "De Zeven Provincien" N.V.*, [1987] 1 App. Cas. 24, 40 (1986) (recognizing a litigant's entitlement to seek foreign discovery "provided always that such means are lawful in which they are used").

Concerns about maintaining parity among adversaries in litigation likewise do not provide a sound basis for a foreign discoverability rule. In the case of requests from foreign tribunals seeking to enforce public laws, it is not at all unusual for government authorities to have broader powers of discovery than private parties. See, *e.g.*, Antitrust Civil Process Act, 15 U.S.C. 1311 *et seq.*; 18 U.S.C. 1505; EC Merits

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poenas, 325 F.3d at 1304. The United States, however, has not entered into MLATs with every foreign nation. Accordingly, a foreign discoverability requirement could prevent a foreign government from obtaining requested information if the foreign government seeks that information by means other than the MLAT procedure.

Amicus Br. 6 (describing "dawn raids"). And whether information is sought by a foreign tribunal or an "interested person," the foreign tribunal itself can adopt appropriate rules of practice respecting the admission of evidence to maintain whatever measure of parity that it concludes is appropriate. See *South Carolina Ins. Co.*, [1987] 1 App. Cas. at 41 ("English procedure does not permit pre-trial discovery of documents against persons who are not parties to an action * * * for the protection of those third parties, and not for the protection of either of the persons who are parties to the action.").

C. A "Foreign Discoverability" Requirement Cannot Be Inferred From United States Discovery Practices

Petitioner suggests that a "foreign discoverability" requirement can be inferred from United States discovery practices. Pet. Br. 19-20 ("[I]f AMD were pursuing this matter in the United States, U.S. law would preclude it from obtaining discovery of Intel's documents."). The inquiry into whether a federal court could order production of analogous materials if an analogous proceeding were taking place in the United States, rather than abroad, may be a consideration in the district court's exercise of discretion, but it sheds little light on the meaning of Section 1782 because Section 1782 expressly would not apply in that situation. Congress enacted Section 1782 to deal with the provision of judicial assistance to foreign tribunals; it did not include any indication that such assistance would necessarily depend on whether United States courts would grant discovery in analogous circumstances.[15]

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[15] A United States tribunal can, of course, obtain discovery from targets during the investigative phase of the agency's proceedings. See *e.g.*, Antitrust Civil Process Act, 15 U.S.C. 1311 *et seq.* Hence a foreign discoverability requirement founded on United States practice would be limited to private requests. But the text of Section 1782 does not suggest

In short, Section 1782 does not categorically prohibit a district court from ordering production of materials simply because the foreign tribunal or the interested party would not be able to obtain them if they were located in the foreign jurisdiction. Rather, the district court retains discretion to take that consideration into account in the course of considering whether to render the requested assistance. See pp. 26-30, *infra*.

III. THE DISTRICT COURT RETAINS DISCRETION TO DENY DISCOVERY IN THIS CASE

Congress recognized that rigid discovery rules are frequently not compatible with the wide variety of discovery requests that might emanate from foreign tribunals. Section 1782(a) accordingly provides that a district court "may order" the provision of testimony or documents and "may prescribe" the practice and procedure for taking the testimony or producing the documents. 28 U.S.C. 1782(a). The district court retains discretion to deny discovery based on individualized considerations. Such considerations may ultimately lead to the development of supervisory rules that channel the district court discretion. But this Court should not announce such rules in the first instance.

A. Section 1782 Expressly Confers Discretion

Section 1782's direction that a district court "may order" discovery expressly allows a district court to tailor its assistance to the particular circumstances before it and to consider comity or litigation fairness concerns that might arise in individual cases. See *Bayer AG*, 146 F.3d at 196; *Metallgesellschaft AG*, 121 F.3d at 79; *Gianoli Aldunate*, 3 F.3d at 60. As the Senate Report explains:

> In exercising its discretionary power, the court may take into account the nature and attitudes of the government

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a categorical rule that distinguishes between requests from a "foreign tribunal" and those from "any interested person."

> of the country from which the request emanates and the character of the proceedings in that country, or in the case of proceedings before an international tribunal, the nature of that tribunal and the character of the proceedings before it.

S. Rep. No. 1580, *supra*, at 7. As a consequence, the district court may consider the nature of the pending foreign investigation as well as the likelihood, imminence, and character of the future adjudicative proceedings in which the discovered material would be used. A district court is not required to grant pre-adjudication discovery simply because it has authority to do so. See, *e.g.*, *United States* v. *United Kingdom*, 238 F.3d 1312, 1319 (11th Cir.), cert. denied, 534 U.S. 891 (2001); *United States* v. *Sealed 1*, 235 F.3d 1200, 1202 (9th Cir. 2000); *In re Application of Esses*, 101 F.3d 873, 876 (2d Cir. 1996).

District courts also have the discretion to consider foreign discoverability as a relevant factor in determining whether a request for discovery is appropriate. A district court is entitled to examine whether a request for discovery under Section 1782 is unduly burdensome or otherwise improper. See, *e.g.*, *Bayer AG* v. *Betachem, Inc.*, 173 F.3d 188, 191 (3d Cir. 1999) (affirming district court decision denying request for unredacted documents as cumulative). The court may likewise examine whether the party seeking assistance under Section 1782 is trying to circumvent foreign discovery limits or other policies of a foreign country or this Nation that would make the requested discovery inappropriate. See, *e.g.*, *Four Pillars Enters.*, 308 F.3d at 1080-1081 (affirming decision to provide applicant with only limited Section 1782 assistance in light of, *inter alia*, applicant's conviction for conspiracy to steal trade secrets). The Federal Rules of Civil Procedure provide the district courts with tools for fashioning appropriate discovery orders and limiting inappropriate requests. See, *e.g.*, Fed. R. Civ. P. 26(b)(1) and (c).

B. Reviewing Courts May Announce Supervisory Rules To Channel District Court Discretion

Section 1782 contemplates that district courts will exercise their discretion on a case-by-case basis. Nevertheless, those courts are likely to face recurring fact patterns and issues. As petitioner points out, reviewing courts have inherent supervisory authority to formulate rules of "sound judicial practice," *Thomas* v. *Arn*, 474 U.S. 140, 147 (1985), and to identify principles for "channeling the discretion" of federal district courts, *Calderon* v. *Thompson*, 523 U.S. 538, 554 (1998), to foster consistent outcomes in like situations. See Pet. Br. 35.

The United States, in its brief at the petition stage, suggested factors that would inform the district court's exercise of discretion in this case, see U.S. Pet. Amicus Br. 14, 18-19, and some of those factors may ultimately provide the basis for general rules of practice. Most significantly, the European Commission is now clearly on record, through its amicus curiae briefs in this Court, that Section 1782's provision of judicial assistance may be inimical to its investigations. EC Merits Amicus Br. 11-18. The European Commission's assertions may provide a substantial basis for the district court to decline to provide judicial assistance in this case. See U.S. Pet. Amicus Br. 18-19. Furthermore, if the Commission means to say, as a general matter, that it does not desire to receive judicial assistance from United States courts through Section 1782, the Commission's position could properly lead United States courts to follow a general rule of declining to provide a form of assistance that the foreign tribunal does not want. See Smit, *supra*, 25 Syracuse J. Int'l L. & Comm. at 13 ("[A]n American court may properly take into account a foreign or international tribunal's ruling that the evidence sought should not be produced.").

C. This Court Should Not Announce Supervisory Rules At This Juncture

Although petitioner and its amici have set forth considerations that may counsel the district court to deny judicial assistance in this case, and those considerations may ultimately provide the basis for developing general rules to channel the district court's discretion, the Court should not attempt to develop any such rule at this juncture. There are compelling reasons why the Court should decline to do so.

First, the considerations that petitioner and its amici cite have not received adequate scrutiny in the proceedings below to ensure that they provide a solid foundation for announcing a generally applicable rule that would control this case. For instance, petitioner and its amici express concerns that the discovery in this case may lead to "fishing expeditions" and disclosure of confidential information, encourage sham litigation in foreign tribunals to obtain discovery, or undermine the European Commission's leniency program. See Pet. Br. 4-5, 37-38; EC Merits Amicus Br. 13-15; Chamber of Commerce Amicus Br. 26-27. But neither the proceedings below nor the filings in this case provide concrete evidence establishing the realistic contours of those threats or the scope of an appropriate rule to curtail abusive practices while preserving legitimate discovery.[16]

Second, as an institutional matter, this Court does not normally announce broad new principles in the first instance, but instead obtains guidance from the experience of the

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[16] For example, the European Commission expresses concern that parties may file "pretextual complaints" with the Commission in order to trigger Section 1782 and "obtain access in the United States to confidential documents describing his competitor's business practices." EC Merits Amicus Br. 14. But no one has suggested that respondent's complaint in this case is pretextual or that Section 1782's preservation of legally applicable privileges and discretionary limitations on discovery would be ineffective in preventing such disclosures.

lower courts. Such guidance is imperative here because this Court has received the view of only one foreign governmental entity—the European Commission—respecting Section 1782's effect on foreign proceedings, and it is not clear whether those views are more widely shared in the international community. Because this Court's announcement of any supervisory rule could have far-reaching national and international consequences, the Court should not proceed without the perspective and judgment of the lower courts that have practical experience in applying Section 1782 to specific factual contexts.

Finally, the discovery dispute in this case may be most properly resolved on narrow grounds. If the Court agrees with the United States' primary submission that Section 1782 authorizes, but does not require, judicial assistance in this case, then the district court should have the opportunity in the first instance to resolve the dispute on what it determines to be the most appropriate basis. In doing so, the district court should have "the necessary flexibility" to determine that this specific discovery dispute should be resolved on "narrow facts" that "resist generalization." *Cooter & Gell* v. *Hartmax Corp.*, 496 U.S. 384, 404 (1990).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2004

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* The Solicitor General is disqualified in this case.

ADDENDUM

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1.	28 U.S.C. 1782 (current version)	2a
2.	Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630	3a
3.	Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769	3a
4.	Act of June 25, 1948, ch. 646, 62 Stat. 949	4a
5.	Act of May 24, 1949, ch. 139, 63 Stat. 103	4a
6.	Act of Oct. 3, 1964, § 9, 78 Stat. 997	4a
7.	Pub. L. No. 104-106, § 1342(b), 110 Stat. 486 (1996)	5a

1. Section 1782 of Title 28, as amended, provides:

Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege.

(b) This chapter does not preclude a person within the United States from voluntarily giving his testimony or statement, or producing a document or other thing, for

use in a proceeding in a foreign or international tribunal before any person and in any manner acceptable to him.

2. Section 2 of the Act of March 2, 1855, ch. 140, § 2, 10 Stat. 630 provided, in relevant part:

> *And be it further enacted*, That where letters rogatory shall have [been] addressed, from any court of a foreign country to any circuit court of the United States, and a United States commissioner designated by said circuit court to make the examination of witnesses in said letters mentioned, said commissioner shall be empowered to compel the witnesses to appear and depose in the same manner as to appear and testify in court.

3. The Act of March 3, 1863, ch. 95, § 1, 12 Stat. 769, provided in relevant part:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the testimony of any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony shall have been issued from the court in which said suit is pending, on producing the same before the district judge of any district where said witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. * * *

4. Section 1782 of the Act of June 25, 1948, ch. 646, 62 Stat. 949, provided in relevant part:

Testimony for use in foreign country

The deposition of any witness residing within the United States to be used in any civil action pending in any court in a foreign country with which the United States is at peace may be taken before a person authorized to administer oaths designated by the district court of any district where the witness resides or may be found. * * *

5. Section 93 of the Act of May 24, 1949, ch. 139, 63 Stat. 103, provided in relevant part:

Sec. 93. Section 1782 of title 28, United States Code, is amended by striking out "residing", which appears as the sixth word in the first paragraph, and by striking out from the same paragraph the words "civil action" and in lieu thereof inserting "judicial proceeding".

6. Section 1782 of Title 28, as amended by Section 9 of the Act of October 3, 1964, Pub. Law No. 88-619, 78 Stat. 997, provided in relevant part:

Assistance to foreign and international tribunals and to litigants before such tribunals

(a) The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a

person appointed by the court. By virtue of his appointment, the person appointed has power to administer any necessary oath and take the testimony or statement. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

A person may not be compelled to give his testimony or statement or to produce a document or other thing in violation of any legally applicable privilege. * * *

7. Section 1342(b) of the National Defense Authorization Act for Fiscal Year 1996, Pub. Law No. 104-106, 110 Stat. 486 (1996), provided:

Section 1782(a), title 28, United States Code, is amended by inserting in the first sentence after "foreign or international tribunal" the following: "including criminal investigations conducted before formal accusation".